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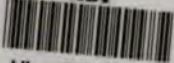
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IRISH LAW REPORTS,

OF

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ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

AND

EXCHEQUER OF PLEAS,

DURING THE YEARS 1844 AND 1845.

Queen's Bench:

By JOHN S. ARMSTRONG, Esq. and WILLIAM H. FALLOON, Esq.

Common Pleas and Exchequer Chamber:

By DOMINICK M'CAUSLAND, Esq.

Exchequer of Pleas:

By ROSS S. MOORE, Esq. and J. P. BOYLE, Esq.

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ERRATA.

Page 16, fourth last line Marginal Note, *dele* "has."

,, 73, last line, for "Demurrer allowed," *read* "Judgment for defendant."

,, 149, last line, *dele* "CRAMPTON, J., *dissentiente*."

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C A S E S

IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

AND

Exchequer of Pleas.

PEARSON v. SHAW.

(*Queen's Bench.*)

1844.
Queen's Bench.

Trinity Term.
June 1.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange.—At the trial of the cause before the Chief Justice at the Sittings after last Easter Term, the plaintiff proved that the bill fell due on the 23rd of September 1843, and was duly presented to the acceptor and dishonored; but no notice of the dishonor was given to the drawer until the 25th of September following. The 24th, the day on which notice of the dishonor ought, under ordinary circumstances, to have been given, was Sunday; but no evidence of that fact was given at the trial, and the learned Judge nonsuited the plaintiff for want of due presentment.

The Court is bound to take judicial notice that a particular day of the month falls on Sunday.

Mr. *Berwick*, Q. C., now moved that the nonsuit be set aside.—The plaintiff was not bound to prove that the 24th fell on Sunday; the Court ought to have taken judicial notice of it: *Roscoe Evid.* 51; *Hanson v. Shackleton* (a). If we had proved notice had been given on the 24th,

(a) 4 D. P. C. 48.

T. T. 1844. and the defendant had brought a writ of error, the Court would be bound to treat such notice as a nullity, and set it aside.

Queen's Bench.

PEARSON

v.

SHAW.

Mr. Rolleston, contra.

Per Curiam.

Let the nonsuit be set aside, and a new trial had without costs.*

* Vide *Brough v. Parkins* (2 Ld. Raym. 994), where it is stated by Holt, C. J., "We take notice of all feasts, and the almanack is part of the common law, the calendar being established by Act of Parliament; and it is published before the Common Prayer-book:" 1 Stark. Evid. 507. The almanack is good evidence to prove the day of the week: *Page v. Faucet* (Cro. Eliz. 227.)

THE QUEEN, at the prosecution of WILLIAM RYAN,

v.

HAYNES and others.

June 1.

On the trial of an indictment at common law for a nuisance in a public navigable river, by erecting weirs, a finding by the Jury, that such weirs obstructed the navigation, but to a very trifling degree, *Held*, to amount to a verdict of guilty.

It is no defence to such indictment, that although the weirs be in some degree a hindrance to the navigation of smaller vessels, yet that they were advantageous to larger vessels, by pointing out the channel.

INDICTMENT for a nuisance at Common Law, for obstructing the navigation of the river Bandon, an ancient river, and common highway for all navigable vessels, by the erection of weirs for taking fish; and thereby preventing the free and uninterrupted navigation of the river. The second count was founded on the statute 5 & 6 Vic. c. 106, s. 22, and averred that the traversers, not being the proprietors of a several fishery in the said river Bandon, did in a place where the breadth of the channel at low-water mark was less than three quarters of a mile, erect a stake weir. Plea—not guilty.

At the trial before the Chief Baron, at the Spring Assizes of 1844, for the county of Cork, he left the case to the Jury chiefly on the first count, telling them that on the second count they should be satisfied of the defendants having erected the weir since the passing of the late Fishery Act, but that the evidence was rather the other way; that on the facts of the case the question for them was on the first count.

The traversers' Counsel submitted that with respect to the first count, he should tell the Jury if they believed there was any obstruction caused by the weir, yet if the advantage counterbalanced the inconvenience caused

by the obstruction, they should find for the traversers; and that if there was a reasonable space left for navigable vessels, notwithstanding the weirs, they should also so find; and that unless they believed the obstruction to be substantial, that is, that great inconvenience was occasioned by it, they should also find for the traversers. The Chief Baron declined doing so, and the Jury finding that the navigation was obstructed, but to a very trifling degree, he directed them if that was their opinion, to find a verdict of guilty on the first count, leaving it to the traversers to move the Court to have a verdict of not guilty entered, if the Court should think them entitled to it; and the Jury found accordingly, guilty on the first count, and not guilty on the second.

A conditional order having been obtained to have a verdict of not guilty entered, pursuant to the leave reserved—

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Mr. Bennett, Q. C., with whom was Mr. E. Corbet, now showed cause.

As to the first point, that the benefit counterbalanced the injury, *Rex v. Ward* (a) is conclusive; there the law was fully reviewed, and although the obstruction was trifling, and a public benefit accrued by reason of the erection of an embankment, yet the Court refused to allow a verdict of not guilty to be entered, thus overruling *Rex v. Russell* (b). Then as to the second point; that reasonable space was left for navigable vessels; that case of *Rex v. Russell* goes to a great extent, for although there the portion taken was for public purposes, and enough left for all ordinary purposes, although it was in fact a wharf for the facilitating the landing of coals, Lord Tenterden dissented from the views of Justices Bayley and Holroyd, and says (c), "The question I take properly to have been whether the navigation and passage of vessels on this public navigable river was injured by these erections." In *Rex v. Russell* (d), it was held, that sufficient room being left in a public street for two carriages to pass, is not a justification for placing a waggon on the street, and having it standing there so that the public were inconvenienced. The Court say, "The primary object of the street was for the free passage of the public, and any thing which impeded that free passage, without necessity, was a nuisance." But it was thirdly objected by the traversers' Counsel, that the obstruction should be substantial, and a great public inconvenience. How or where can the line be drawn? *Weld v. Hornby* (e) lays down that erecting a weir in a river for stopping fish going up, is a nuisance. *Rex v. Tindal* (f) may be quoted on the other side; but in that case the special verdict found, that by the defendant's works, the harbour was in some extreme cases rendered less secure.

(a) 4 Ad. & El. 384.

(c) p. 602.

(e) 7 East, 195.

(b) 6 B. & Cr. 566.

(d) 6 East, 427.

(f) 6 Ad. & El. 143.

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Mr. *O'Hea*, with whom was Sir *Coleman O'Loughlen*, contra.—The verdict was not the verdict of the Jury; they gave their opinion that there was a very slight interference with the navigation of the river, and it was left by the Chief Baron to them to say, if that finding amounted to guilty. In *The King v. Ward*, quoted on the other side, the Jury stated that an impediment existed. The Chief Justice refused to receive that verdict, and sent the Jury back to say if there was a nuisance; but here the Chief Baron did not leave that question to the Jury. The obstruction it was proved, only affected lighters and small boats; and it was sworn that the poles of the nets were useful in pointing out to larger vessels the navigation of the channel, and that that counterbalanced the obstruction to the smaller boats; but the Chief Baron refused to leave the question in that way to the Jury. *The King v. Russell* was a case where the compensating advantages were of a different kind.—[CRAMPTON, J. I do not think you called on the Chief Baron to leave any thing to the Jury. PENNEFATHER, C. J. The Chief Baron said, "if you are of that opinion," therefore it is not his verdict.]

Sir *Coleman O'Loughlen*, on same side.—The question is, whether on the finding of the Jury, a verdict of guilty should be entered up. There are two counts in the indictment; the second is out of the consideration of the Court, and the first is for a nuisance at Common Law. The maxim *de minimis non curat lex*, applies to nuisances: *King v. Ward*. An impediment in a river may be too trifling to cause a nuisance: *King v. Tindal*. The question of nuisance or no nuisance is one for the Jury, not for the Court: 1 *Gabb. Cr. Law*, 758; and it is one of degree. The Jury have not found the obstruction was a nuisance, although they found that the river was obstructed.—[CRAMPTON, J. The nuisance was a nuisance by obstruction, and the Jury have found it was an obstruction.]

If then we are not entitled to a verdict of not guilty, we should have a new trial, although the rule is not in the alternative; for this is a criminal case. The evidence was that it was only at certain periods of the tide and wind that the weirs could be injurious to small boats.

Mr. *Corbet*, in reply.—In *The King v. Stafford (a)*, Lord Tenterden says, "It has long been established, that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another." In the present case, is the advantage to larger vessels a sufficient compensation for obstructing the smaller vessels? It is contended that the Chief Baron should have told the Jury, if the advantage in the one case counterbalanced the injury in the other, to find for the traversers; but *Rex v. Russell (b)* did not go that

(a) 1 B. & Ad. 887.

(b) 6 B. & Cr. 566.

length, and that case has been overruled: *Rex v. Pease* (a); *Rex v. Morris* (b); *Hawk. Pl. Crown*, 696, 701. They also called on the Judge to tell the Jury, if they found a sufficient space was left for the purposes of navigation, not to find against the traversers. The question is, was the passage commodious or not? It is then said that the obstruction should be substantial, to enable the Jury to find against the traversers; but there is no case to sustain such a position.

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PENNEFATHER, C. J.

The Court are of opinion that the verdict is quite right, and that there are no grounds to set it aside, either with reference to the charge of the Chief Baron or the finding of the Jury. It is needless to go through the cases. Here is a class of men, the owners of small boats, who are entitled to the navigation of a public river; and it is an injustice which the Court will not sanction, that because of another class of vessels being advantaged, that will do away with the injury to smaller vessels. Every person has a right to the King's highway, and no one can obstruct that by making an erection which causes an obstruction. This is not the case of building an erection in certain places which may injure a few individuals, but on the whole is, perhaps, an advantage to the public; but here, a person erects private weirs, to the injury of a class of people who must not be injured by private speculations of this description. If the Chief Baron had directed the Jury as the Counsel for the traversers contend, he would have done wrong. No person has a right to say, "I will leave the public a portion of a highway and take the rest to myself."

BURTON, J., and CRAMPTON, J., concurred.

PERRIN, J.

I concur in the judgment of the Court. Nothing was withdrawn from the Jury in this case. If the same thing was done to a road, causing an injury to foot passengers, it would be no excuse to say that it was a benefit to carriages.

Allow the cause shown.

Mr. Bennett then prayed judgment, and that the weirs be prostrated forthwith.

Mr. Corbet applied for liberty to issue a writ of prostration of the weirs.

June 7.

BURTON, J.—It is more conformable to the practice of the Court to

(a) 4 B. & Ad. 30.

(b) 1 B. & Ad. 441.

T. T. 1844. serve a notice of the order for prostration; and if not attended to we
Queen's Bench. will grant the writ.

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v.

HAYNES.

THOMSON v. GUY.

June 4.

When on a sale by auction of certain property of a bankrupt, the conditions of sale referred to public advertisements which professed to contain a description of the property to be sold—*Held*, in an action of assumpsit by the vendee against the assignee of the bankrupt to recover back the deposit on the purchase-money, that these advertisements were admissible evidence to show that the conditions of sale misdescribed the premises.
Dissentiente
 PENNEFA-
 THER, C. J.

ASSUMPSIT.—The action was brought for the recovery of £170, paid by the plaintiff as a deposit for the purchase of Lot No. 4, of the property of one George Ogle Godfrey, a bankrupt, from the defendant as his assignee, and was tried before the Chief Justice, at the Sittings after Michaelmas Term 1843.

It appeared that that the assignee had advertised a sale of the bankrupt's property in the newspaper of the neighbourhood where it was situated, and posted hand-bills describing it in the manner following:—
 "The interest in all that and those plots of ground, small houses, and warehouses, situate near the Merchant's-quay, fronting the Monaghan road, in the town of Newry, and county of Armagh, the whole measuring in the front of the Monaghan road, 126 feet 3 inches, in depth on the east from the Monaghan road, 85 feet 6 inches, be the said admeasurements more or less, bounded and described as in the original indenture of lease of said premises bearing date the 3rd day of June 1808, made by one Hugh Sherrard to Patrick O'Hanlon, for three lives renewable for ever, subject to the yearly rent of £20 late currency, being £18. 9s. 3d. of the present currency, and £1. 12s. 0d. late currency, being £1. 9s. 6d. British, as a renewal fine on the fall of each life, as set forth in the statement of title of said premises marked No. 4, and settled by the Commissioner." This advertisement was also posted in the Bankruptcy Court, and in the Coffee-room of the town of Newry, where the several parties resided; and in the advertisement the particular lot in question was thus set out:—"No. 4. The said bankrupt's interest in the tenement or plot of ground situate on the south side of Monaghan-street in the town of Newry and county of Armagh, held for three lives renewable for ever, at the annual rent of £18. 9s. 3d., and £1. 9s. 6d. as a renewal fine at the fall of each life.

NOTE.—On this last are, at present, extensive warehouses three stories high, with large wheels and corn kiln attached, which cost a considerable sum, with commodious yards and sheds detached, and an office in front. This is a most desirable lot, from the small head-rent it is subject to, and well suited to any person extensively in the grain or provision trade, or other business requiring extent or accommodation, and is quite contiguous to the new bridge and Custom-house."

The conditions of sale were thus headed:—

“Court of Bankruptcy, Four Courts, Inns-quay, Dublin, 13th day of December 1841.—By order and in presence of his Honor the Commissioner, pursuant to public advertisement duly published for that purpose.”

The several lots were then set out, and Lot No. 4 was thus described :

“A tenement or plot of ground situate on the north side of Monaghan-street, in said town, held for three lives renewable for ever, at the annual rent of £18. 9s. 3d., and £1. 9s. 6d. as a renewal fine on the fall of each life.

“No. 4.—The assignee will furnish to the purchaser such title only as is set forth in the abstract now produced.” The abstract was then set out.

Mr. Frazer, the plaintiff’s attorney, attended the sale, and purchased this lot as trustee for the plaintiff for the sum of £660 ; and having paid £165 as a deposit, he signed the conditions of sale, and also a document to this effect :—

“I, Samuel L. Frazer, of Newry in the county of Down, as trustee for Henry Thompson, do hereby acknowledge that I have this day become the purchaser of the Lot No. 4 specified in the annexed particulars, for the sum of £660, and agree on my part to fulfil the foregoing conditions of sale.

“SAMUEL L. FRAZER,

“Trustee for H. Thompson,”

The question at the trial arose on the admissibility of the advertisement as evidence, whether the plaintiff could vary the document above signed by reference to the printed advertisement, inasmuch as it turned out after the sale, that Lot No. 4 contained only one warehouse, and in other particulars differed from the description in the advertisement. The Chief Justice rejected it as evidence ; and under his Lordship’s direction the Jury found for the defendant.

A conditional order for a new trial having been obtained, cause was now shown by—

Mr. Hatchell, Q. C., with whom was Mr. Whiteside, Q. C.—The advertisement was properly rejected ; it would be a different thing if this was an action on the case by way of fraud ; but it is simply an attempt to vary a written agreement by parol evidence. An abstract of the property is hung up in the Commissioner of Bankrupt’s room ; the assignee sells ; and will it be said that the vendor is bound by a public advertisement differing from that abstract ? That was offered in evidence as part of the contract, and was properly excluded as evidence to vary or qualify

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the written contract; *Dobell v. Hutchinson (a)*. "Pursuant to public advertisement," refers not to a particular advertisement, but to the whole matter; and the purchaser had no right to refer to the advertisement at all as any portion of the contract.—[CRAMPTON, J. If at the time of the sale the purchaser had asked the assignee what is this tenement Lot No. 4? and he answered they were warehouses, and it turned out there was only one warehouse, would the purchaser be bound?—It could not be admitted as evidence as forming part of the contract.—[BURTON, J. What do the words "pursuant to public advertisement" refer to?—They only refer to the time and place, not to the particulars of sale; for the vendor may not sell all the premises or all the articles advertised; it cannot be considered as a representation of what was to be sold.—[CRAMPTON, J. The premises are sold according to the lease.]—One of the conditions of sale is, that the assignee will sell only according to the abstract produced.

Mr. *Macdonogh*, Q. C., with whom was Mr. *Napier*, contra.—It was proved that the advertisement was printed by the order of the assignee; and also, that duplicates of the advertisement were produced and distributed at the sale. In that advertisement it is said "warehouses and wheels," and the buyer only gets one warehouse and one wheel. In the conditions of sale, there is no description of Lot No. 4; it is described generally as a lot or plot of ground: under that description waste ground might be included. The words "pursuant to public advertisement," surely incorporate the advertisement with the conditions of sale, and this evidence ought not to have been rejected: 1 *Sug. Vend. & Purch.* 34, 44; *Robinson v. Musgrove (b)*; *Duke of Norfolk v. Worthy (c)*. The conditions of sale have no description of the premises, and the advertisements were distributed at the sale: *Murley v. M'Dermot (d)*; Denman, C. J., there says, "There was evidence to show that the "handbill in question was circulated in the sale-rooms before and at "the time of the sale; and that it was seen by the person who attended "as the plaintiff's agent, and bid and bought for him. Looking then at "these facts, and the language of the deed, we think this handbill properly "received, not to control the language of the deed, or to construe it, but "to apply it." In this case the reference is pursuant to public advertisement for purposes of sale; but it is said we cannot show fraudulent misrepresentation, although we relied on the material description deceiving us: *Dykes v. Blake (e)*.—[CRAMPTON, J. The plan in that case

(a) 3 Ad. & El. 355.

(b) 8 Car. & P. 469; S. C. 2 M. & Rob. 94.

(c) 1 Camp. 337.

(d) 3 Nev. & Per. 360.

(e) 4 Bing. N. C. 465.

is made part of the sale, and sometimes a map is referred to, by a lease.]—Yes, but the plans and particulars of sale were in that case distinct: *Wright v. Wilson* (a). In 1 *Sug. Ven. & Purch.* 59, 60, that principle is qualified; it is a mistake to say, that fraud must be proved: *Clinan v. Cooke* (b).

The exhibition of a map at the time of the sale, and the reference to it in the particulars of sale, is not so strong as our case, it is a map expressed in language, no blind advertisement. The document we signed describes the tenement as a lot or tenement; that might be a stable. The Courts lean against a vendor: *Dykes v. Blake* (c). Are they to limit the words in the conditions of sale, to the day when the sale is to take place? *Hodges v. Horsfall* (d).—[PERRIN, J. There is a difference here in the contract embodying particulars from the cases cited.]—That case in 3 *Nev. & Per.* 360, is not half so strong for the admission of the instrument as here; it is not a sealed instrument. In case of a policy of insurance, if the policy refer to printed proposals they will be treated as part of the policy: *Worsley v. Wood* (e). We refused to be nonsuited, because we might not afterwards have been allowed to set that nonsuit aside, and we now apply for a new trial.

Mr. *Napier*, on same side.—This is a question of importance; the advertisement is published in the *Newry* paper on a Saturday, for a sale on Monday, and the property would most likely be bought by a resident in *Newry*, who would know the general character of the title, the extent, value and situation of the premises. The advertisement in that newspaper was actually read at the trial, and at the time of its reading the defendant's Counsel took no objection to it; it was only after parol evidence had been given, that they suggested its inadmissibility as evidence. The advertisement is signed by the auctioneer and the officer of the Court of Bankruptcy, and therefore by order of the Court; and after describing the premises, it is added that tickets of inspection of the premises are to be had of the assignee. Lot No. 4 actually contained two warehouses, two wheels, and an internal communication from one to the other; and a person on the spot seeing this, would shape his price accordingly, and yet it is said we have no right to refer to this description. The agency of Frazer was limited to the purchase of what was advertised in the newspaper, it therefore must be the basis of the contract; for he had no time to communicate with his principal.

Mr. *Whiteside*, Q. C., in reply.—The question really is, what is the

(a) 1 M. & Rob. 207.

(c) 6 Scott, 342.

(b) 1 Sch. & Lef. 33.

(d) 1 Russ. & Myl. 116.

(e) 6 T. R. 710.

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contract? and if that be so, plaintiff is bound to show that the advertisement was part of the contract.—[PERRIN, J. Suppose a plain misdescription made by the vendor, and a purchaser bought in the belief that such was correct, will you hold that he is precluded taking advantage of it?]*—Powell v. Edmunds* (a). Supposing “pursuant to public advertisement” not inserted, would a contract of sale not referring to that advertisement be part of the contract? Unless incorporated, it can be no part of the contract, and we say the advertisement has not been incorporated here. The assignee of course must take care that the muniments of title are put forward properly: *Hind v. Whitehouse* (b). Lord Ellenborough says, in p. 569, “A mere writing on a catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a bargain under “these conditions of sale:” *Meres v. Ansell* (c). It is said that the advertisement is the foundation of the contract.—[CRAMPTON, J. That cannot be held; but you have to show us that it is no part of the contract.]—The abstract of title was produced at the time of the purchase, and it sets forth the lease; but the complete contract of the parties signed by them should bind them, *caveat emptor*: here there is no fraud imputed, and it was the duty of the plaintiff’s attorney to have examined into the matter. Do the words “pursuant to public advertisement,” refer to the printed paper offered at the trial? *Boydell v. Drummond* (d) shows there must be a plain and direct reference. *Johnson v. Dodgson* (e). The advertisement does not incorporate the contract, and the words “pursuant thereto” might refer to half a dozen papers. The object in *Hodges v. Horsfall* was to connect the contract with a certain plan, and really that case is an authority for us. The lives and years in the lease are not specified as in the passage from *Phillips on Evidence*, p. 298, *Feoffees of Heriot Hospital v. Gibson* (f); Lord Eldon says, p. 307, “It is perfectly wild to say, that the mere exhibition of a plan was sufficient to form a binding contract.” The contract here is the one signed by the parties, and nothing else; and the reference to public advertisement is merely as to the time of the sale, and not as to the terms of the contract: *Shelton v. Livius* (g).

PENNEFATHER, C. J.

The Court are not agreed in opinion on this case. I cannot reconcile myself to the grounds on which the other Members of the Court agree. I am bound to say that, considering the decisions that have taken place, grounded on the Statute of Frauds, I do not think that the additional

(a) 12 East, 6.

(c) 3 Wils. 275.

(e) 2 Mees. & Wels. 660.

(b) 7 East, 565.

(d) 11 East, 142.

(f) 2 Dow. P. C. 301.

(g) 2 Cr. & Jer. 416.

advertisement was admissible evidence to give a character or construction to what I conceive to have been an independent contract, previously entered into between the parties.

Assuming that that advertisement was any part of the contract so referred to, on no grounds was that advertisement referred to without a violation of the written contract; and it ought not to have been introduced as a term into the contract. The Acts of Parliament in reference to the Statute of Frauds, are founded on the wisest and most equitable grounds. It is safer, on the whole, to abide by the Statute of Frauds, than to allow it to be broken in upon by extra parol evidence, as thereby contracts may be made available and possible in a way not warranted by law. When a contract is reduced to writing, it speaks for itself; and if decisions have been made, carrying the responsibility of parties beyond the express terms of a contract, it has always been in cases looked upon with jealousy, as infringing upon the wholesome provisions of the statute, and they are not to be resorted to except in two cases; one of those is the case of *Clinan v. Cooke*. In that case A., by public advertisement, offered lands to be let for three lives and thirty-one years; and proposals having been made by B. and accepted, an agreement was executed between them, in which the term for which the lease was to be made was not mentioned; it was held, there being no reference in the agreement to the advertisement, parol evidence could not be received to connect one with the other so as to ascertain the term. That case gives a very clear view of the disinclination of Courts to carry a contract out of its express terms. Lord Redesdale's decree in that case was confirmed. He thought that Courts had no right to enter into private feelings upon a law whose general principle was hard and severe; but that the letter of the law must be carried out, although in a particular instance injustice may be wrought. The case, too, of *Boydell v. Drummond* contains the same principles carried to the same length as in *Clinan v. Cooke*, indeed they even go beyond it; because in *Boydell v. Drummond* there were certain prospectuses produced, and in the shop at the time of the person signing his name; but because there was no specific reference to those prospectuses, it was held he was only bound to his written contract.

Now, what are the facts of this case? A person seized of premises in the town of Newry becomes bankrupt, and his property is taken possession of, and a certain day and time appointed for the sale of these premises in the Court of Bankruptcy. Every one knows that in cases of bankruptcy, certain forms are always gone through, and these forms are more than ceremonies. Advertisements are published, and means are taken to induce the greatest number of bidders; and it is no disparagement to the integrity of the proceedings, that the advertisements paint

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the premises in higher colours than they should bear; and it is no fraud that the auctioneer represents the property in glowing terms. Advertisements are not *per se* considered part and parcel of a contract, they are merely introductory matter; the rule is *caveat emptor*; and that pervades the law. On the 13th December 1841, Frazer attends the sale as trustee for the plaintiff Thomson, for the purpose of purchasing part of the property. Now, I do not think that this case should rest on the exact question whether the advertisement was one of those preliminary advertisements published with the view of inducing bidders to that auction; when bidders come in and see what is set up to be sold, they are then to form their own judgment as to what extent they think proper to bid; I, therefore, think it is to be thrown out of the question, the particular nature of those particular advertisements *per se*. It was the buyer's business to see and know what the premises were, and if he were deceived, the fault was his own. Suppose there had been no advertisement, but Frazer had heard an exaggerated account of the premises, and had bid accordingly, would he be allowed to say—"I have been induced to bid more than I should, and therefore, I will not enter into a contract." Why no Court would listen to that. Now here Frazer does not rely on casual information; but he goes into the Court of Bankruptcy, and finds what is set up for sale, eight distinct lots of property in Newry about to be sold by auction; the particulars and conditions of sale are thereafter specified, and then is the time for parties to know what they are bidding for. They are in the matter of Godfrey Ogle, a bankrupt, and there are eight lots. It is a mistake to say that any of these lots are not sufficiently described to be binding on a purchaser; the Court of Chancery could not entertain an answer of that sort to a bill for specific performance, and a good bill could be drawn against the purchaser on the specification of Lot No. 4. He bid for Lot 4, and after bidding he signs his name in the book as evidence of the contract; he is bound by that, and the premises so purchased in that contract are specified in the annexed abstract. The auctioneer joins in completing that contract, and certifies he has sold Lot No. 4, specified in the annexed particulars; the annexed particulars, but particulars not annexed at all, are said should be part and parcel of the contract. It is there, I say, that the Statute of Frauds is departed from; the parties under hand and seal say the annexed particulars are what the one bought and the other sold, and they agree in like manner that the annexed conditions of sale are those and those only to which the parties bound themselves in reference to the terms of the contract. The condition of sale annexed to Lot No. 4, is that the assignee will furnish such title only as in the abstract now produced; and what was it that is so set out? The annexed particulars are—"Lot No. 4, a tenement or plot of ground

"situate on north side of Monaghan-street in said town, held for three
 "lives renewable for ever at the annual rent of £18. 9s. 3d., and
 "£1. 9s. 6d. as a renewal fine on the fall of each life." For those premises
 so set out, the particulars are quite specific to enable any purchaser to
 file a bill against the vendor to enforce the contract; and the seller could
 not say, your demand is uncertain, and therefore the Court will not carry
 it into execution. What is now insisted on is, that the plaintiff may
 have carried for him into execution a contract not for sale of Lot No. 4,
 but for a contract of quite a different kind, the particulars of which are
 quite different from those contained in Lot No. 4; and if we go out of
 Lot No. 4, to what extent is the responsibility of the defendant to be
 carried? He is bound only to carry out the particulars specified in the
 abstract mentioned; otherwise, he would be bound to furnish title to
 the remainder of the premises not included in the purchase. The
 Statute of Frauds and its provisions should be strictly adhered to; its
 salutary provisions have been always respected by lawyers; and seeing the
 advantage of adhering to it, and that Judges have constantly regarded it,
 I for one treat the idea of intruding upon those rules already established
 by decided cases as altogether futile.

But it is said I view this subject under a mistake, because those who
 differ from me do not go beyond the provisions of the Statute of Frauds,
 as by a certain line introduced into the terms of sale, obliging the
 defendant to make good what is contained in that line, they are not
 going out of the statute. Now, first, compare this with *Clinan v. Cooke*;
 it would be difficult to find a case of greater hardship. According to the
 decisions cited by Mr. Whiteside, there is no case that would serve as a
 precedent for carrying out the contract to such a length as is done here.
 It is said the party is to be bound not only by what he has signed and
 the particulars annexed, but to be bound also by the terms of an adver-
 tisement, not having a reference to the time of its publishing, or by whose
 authority, or where or by whose orders it was so published. The words
 "pursuant to public advertisement" are simply stated; it may be pre-
 sumed there were advertisements, but those are for publicity to the sale,
 not for the terms of sale; merely advising the public when the auction
 would be. I therefore think the verdict for the defendant was right;
 and that there is no ground for setting it aside for the purpose of letting in
 additional evidence.

BURTON, J.

This is a case of some importance; and I must confess I cannot agree
 with my Lord Chief Justice, notwithstanding his very forcible observa-
 tions, which lead me to distrust my own judgment. The ground on which
 I think a new trial should be granted is simply, that the purchaser alleges

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he has been deceived in his purchase and misled. I have every respect for the Statute of Frauds, and am satisfied that we should avoid making any decision which may interfere with the provisions of that statute. But in this case the verdict has been found under the direction of the Judge, and there not having been any question submitted to the Jury, nor any allowance of inference left to them, is a principal ground on which I rest my decision for a new trial. The evidence ought to have been admitted, and the case put to the Jury with that particular document. I do not think the admission of this evidence amounts to an attempt to break in upon the provisions of the Statute of Frauds. The case is this: the property belongs to a bankrupt, and a sale of that property is directed by the authority of the Court of Bankruptcy; and the direction is that that sale should take place by auction "pursuant to public advertisement" (which advertisement is expected to contain every thing of importance), and is just as effectual as a decree of a Court of Equity, directing in what way the sale should take place; and what is stated in that advertisement should be stated truly. Now, was the advertisement in question such a document as ought to be received in evidence? The conditions of sale contain no particular representations of Lot No. 4: they state it simply as a plot of ground; but they say it is to be sold "pursuant to public advertisement." I think that the document so published by the authority of the Court, and being referred to by the conditions of sale as to the nature of the property to be sold, and having been distributed during the sale, ought to have been submitted to the Jury; and not having been so, the verdict ought to be set aside.

CRAMPTON, J.

I think there ought to be a new trial in this case. The question is a mere legal one, viz., whether this document is, under the circumstances, admissible in evidence. I do not question a single case cited; about the principle there is no difficulty. It is in the application that the difference exists. If the admissibility of the document were contrary to the provisions of the Statute of Frauds, it ought to be rejected at once, but in my opinion the statute does not stand in the way. Generally speaking, you cannot go out of a written contract to have it explained by parol evidence; at the same time that position, though generally true, is not to be universally stated, for there are two cases in which extrinsic evidence may be resorted to, first, if there be a reference to another document by the one in evidence before the Court, on plain principles that document may be put in evidence as part of the contract; at the same time that it must be admitted that without such reference that other document was inadmissible. In the case also of a latent ambiguity, it is a well established rule that in such a case parol evidence may be resorted to.

The action in this case is brought to recover a deposit, and the purchaser says that he ought not to be compelled to pay it, upon the ground that although the contract was completed, he ought not to be bound by it, because he purchased under a misrepresentation made by the defendant. He had, generally speaking, two things to prove, the contract and the misrepresentations, and to entitle him to recover his deposit a clear misrepresentation must be shown. Exaggerated representations, as puffing advertisements, are not to be taken into consideration; but the question here is as to the description of the premises. It is said that the effect of admitting this advertisement will be to enlarge the contract; that would be against all principle, but it is not so; the advertisement is referred to for a full and particular description of the thing to be sold, and is as much part of the contract as if it were recited in terms in it. Where a document refers to another, it thereby makes that other evidence. The plaintiff having these two propositions to prove is altogether shut out, if this evidence be excluded; and under these circumstances I think it admissible. It is an advertisement for the sale of certain premises, the property of a bankrupt, signed with the name of the auctioneer and registrar of the Court of Bankruptcy, and it was therefore an authorised advertisement, and in point of fact, under and according to its terms the sale took place. I do not mean to say that alone would make it evidence, but here it is clearly referred to by the contract, as containing the particulars of the thing to be sold. It therefore appears to me, both in point of law and fact, that this advertisement is part of the *corpus* of the contract, and that it is not enlarged or varied by it, and the Statute of Frauds is not infringed, but that it is a more particular enumeration of what is sold; and upon these grounds I think it ought to have been sent to the Jury.

PERRIN, J.

I think the evidence should have been received, and that the verdict must be set aside. The action is brought by Thomson to recover a deposit made by him, and he says, that he entered into an agreement different from what has been represented; that he agreed to purchase upon a misrepresentation in an advertisement, which was produced at the sale, and distributed among the persons present at it, which stated, that upon the lot advertised to be sold there were extensive warehouses. Relying upon that which he believed to be true, he entered into this contract, which he otherwise would not have done. That being the case, I think it was competent for the party to show that it was entered into upon a misrepresentation in a very material matter, very possibly amounting to a fraud, and that it should have been submitted to the Jury; and as that has not been done, I think that this verdict ought to be set aside.

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T. T. 1844. *Queen's Bench.* I do not think that this interferes with the doctrine in the cases upon the Statute of Frauds, as I rely upon this, that the party has been imposed on.

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Order absolute.*

* Vide *Fuller v. Wilson*, 2 Gal. & Dav. 473.

In the Matter of JOHN CONWAY, . . . *Appellant* ;
And JOHN BAXTER, . . . *Respondent*.*

Jan. 21.

On motion to strike a burgess off the roll; *Held*, that a conditional order need not state the grounds upon which the party is sought to be removed.

Semble; that a party cannot delegate to another a general power to sign notices of objection.

Quære.—Has this Court jurisdiction to strike a burgess off the roll, where an objection has not been made in the Court below to the burgess?

In this case a conditional order had been obtained, that the name of John Baxter should be erased from the burgess-roll of the borough of Dublin.

The affidavits in support of the conditional order stated that the name of John Baxter appeared on the burgess-roll; that notices of objection to his being retained on the roll, signed Thomas Leslie, were by his direction served on Baxter and the Town-clerk: that one Henry Beattie had been authorised by Thomas Leslie to sign those notices in his name; that at the Revision Court service of those notices, and the authority given by Leslie to Beattie to sign them having been proved, the Court decided that the notices were not good and valid notices of objection, and refused to entertain those objections; and Baxter's name was retained on the roll.

The affidavit of Beattie stated that Leslie authorised and directed him to sign his (Leslie's) name to all notices of objection which he should think fit to make, to any of the persons whose names were on the Town-clerk's lists, who were not duly qualified to be enrolled as burgesses, and who ought to be objected to; and also, to cause notices to be served in his (Leslie's) name, and for him on the Town-clerk, and on such persons as the same should be directed to: that John Baxter was in arrear and liable to several taxes, and that if the Court had entertained the objection, Baxter's name would have been struck off the list of burgesses.

The affidavits filed as cause against the conditional order stated that Thomas Leslie had said he had never authorised any person to sign or serve those notices.

* *Absentie* PENNEFATHER, C. J.

Mr. *Martley*, Q. C., now moved to make absolute this conditional order.

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Mr. *Moore*, Q. C., *contra*.—There is a preliminary objection to the conditional order in this case; it does not state the ground upon which they seek to strike Baxter off the roll. This case having been adjudicated on in the Court below, and the party having been placed on the roll, has now a *primâ facie* right to be retained on it; he ought therefore to be apprised upon what grounds they seek to disturb him.

CRAMPTON, J.—The practice has been to make these orders generally.

BURTON, J.—If there be no difficulty imposed on the party, I can see no objection to the form of this order.

Mr. *Martley*.—The question here is, whether it is competent for the person who has authority to make an objection, to delegate that authority to another; we say that it is. This question arises on the 43rd section of the 3 & 4 Vic. c. 108, which enacts, "That every person whose name shall have been inserted in any list for any borough, may object to any other person not entitled to have his name retained on the burgess-roll for the same borough; and every person so objecting, shall give to the Town-clerk of such borough, and also to the person objected to, notice thereof in writing." By that section any person on the roll may sign and serve notices of objection, and there is nothing in it preventing his directing another to sign his name to a notice of objection. If the authority was given for any number of specific cases, it is admitted that it would be perfectly good.—[CRAMPTON, J. Can he give a general power of delegation?—He may delegate as to particular persons. It is analogous to the case of an agent signing a notice to quit, where a subsequent recognition of the authority was sufficient to make it good: *Goodtitle v. Woodward* (a). There can be no inconvenience in holding these notices good; whereas, injustice will be done by allowing a person to remain on the roll not entitled to be there. This section gives him a general authority to object, and he is uncontrolled as to his discretion in the way he should apply it. Under 2 W. 4, c. 45, s. 39, *Eng.*, the Revising Barristers have acquiesced in this: *Delane's Decisions*, 224, 225, 228. Although this may not be considered as a binding authority, yet it shows what the practice in England has been, and that the person is bound to support his claim, no matter how the notice is signed.

Mr. *Moore*, Q. C., and Sir *Coleman O'Loghlen*, *contra*.—The

(a) 3 B. & Al. 689.

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Legislature confined the power of signing those notices to a party having an interest in the matter, and never intended to give a general power. The Revising Barristers say that every person has an interest in the individual to be elected, and therefore that they should not be strict in limiting this right; but that is different from the present case, for a stranger can have no interest in this matter. It would multiply objections to an unlimited extent, to allow this practice to be introduced contrary to the intention of the Act. It is said that this is analogous to authorising a party to give a notice to quit, or to act as receiver under the Court. It is not so; giving a notice to quit is not a power or delegation of a power; and with respect to a receiver, that is in the nature of an equitable transfer to the Court, as the receiver acts for the Court. But supposing it would have the effect stated, there has been no recognition of the authority. This Court has no original jurisdiction except by *quo warranto* to strike a burgess off the roll. In proceeding summarily under the Municipal Act, this Court is but a mere Court of Appeal, and therefore unless the Court below had jurisdiction to strike Baxter off the roll, this Court has none. The first question then is, had the Court below jurisdiction? Now, the Court of Revision had no power to strike Baxter off the roll, unless a good notice of objection was served on him; and no good notice was served here.

Independently of this, however, there is another objection to the present proceeding. The 50th section of 3 & 4 Vic. c. 108, which gives the right of appeal, only relates to the question as to the right of a burgess to be admitted on the roll; here we seek to retain a person on the roll, who had been admitted at some former revision; there is a difference all through the Act between the right of a party to be admitted, and that of one to be retained, on the roll; the 45th section enacts that the Barrister shall insert in the list the name of every person who shall be proved to the satisfaction of the Court to be entitled to be enrolled in the burgess-roll, and shall retain on the said list the names of all persons to whom no objection shall have been duly made and sustained.—[CRAMPTON, J. These are both judicial acts of the officer, and it would be directly contrary to the spirit and the words of the Act, I think, if there was not an appeal for both acts.]

Supposing then an appeal was in the present case proper, the other objection still applies, namely, that as this Court cannot strike off a burgess who has not been properly objected to below, the Court has no jurisdiction here, as Baxter was not properly objected to below.—[CRAMPTON, J. We have granted several conditional orders where the parties were not objected to below.]—These were *sub silentio* decisions, and therefore cannot bind the Court. The 50th section of the English Reform Act is analogous to this section in the Municipal Act, and it was decided under

that section in *Crockford's case* (a), that committees of the House of Commons were not empowered to enter into any inquiry respecting votes which had not been under the cognizance of a Barrister; and the same was also decided in *Cogan's case* (b) and in *Collins' case* (c). These are analogous cases, for if the notice of objection to Baxter was insufficient, the Court below had no right to inquire into his right to be admitted. Now in this case the notice was insufficient in not complying with the statute, as it does not appear on the face of the notice that the objector's name was inserted on the Town-clerk's list, which it should have been in compliance with the statute: *Rex v. Mayor of Harwich* (d) shows that a party objecting should on his notice bring himself within the classes qualified to object, pointed out by the statute. This is a substantial objection, for the party might be a mere volunteer, and have no right: *Rex v. Justices of Essex* (e). Another objection to the notice is, that it is not signed by the party himself, or by his authority. It should be signed by himself or by virtue of a letter of attorney: *Rex v. Mayor of Bridgnorth* (f). According to the allegation here, he gave a general authority to sign, which is contrary to the spirit of the Act.

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Independently of these objections, however, no case has been made for striking Baxter off the roll; the affidavit made to ground this motion is clearly insufficient. It is the affidavit of a mere volunteer on hearsay and belief. To prove Baxter in arrear of taxes, an affidavit should have been made by the collector. On applications of this nature, the facts of disqualification should appear as precisely as on a trial in *quo warranto*.

Mr. Waller, in reply.—As to the objection to the notice, it is not necessary that it should appear on the face of it, that the objector's name was inserted on the Town-clerk's list. The name was inserted in the list, and every burgess was cognizant of it, and it is a substantial compliance with the Act, if the notice state the name and residence of the objector.

As to the authority empowering another person to sign the notice. There is no analogy between this case and the case of a power entrusted to a party to do a certain act; the burgess has nothing delegated, he has a right vested in him, not delegated, and which he can delegate to another; the Legislature has only declared the common law right with certain restrictions.—[BURTON, J. It is an authority to exercise his own judgment.]—It is a sound policy to waive technical objections.—[CRAMP-
TON, J. The 45th section suggests a distinction between making and sustaining an objection.]—Making an objection is a ministerial act. This

(a) Perry & Knapp, 51.

(c) Knapp & Omb. 121.

(e) 7 D. & Ry. 658.

(b) Perry & Knapp, 122.

(d) 2 Jur. 1066.

(f) 2 P. & Dav. 317.

H. T. 1844. is analogous to the power given by a landlord to his agent to serve a notice of distress, or the power to indorse or accept bills of exchange.

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BURTON, J.

It appears to me, and the rest of the Court concur in thinking, that whatever be the facts of this case with respect to the qualification, they are not brought before us in such a shape as to enable us to act upon them.

No doubt, previously to the statute a question of this nature must have been brought before the Court upon an application for a *quo warranto*; but the 9th and 50th clauses of the statute which have been referred to are unquestionably meant to enable the Court, in certain cases, and under certain circumstances, to decide a question of this nature as effectually upon motion as by an application for a *quo warranto*.

The term "appeal" may give some ground for the suggestion made, that this Court only entertains this question upon an appeal, and could not do so upon its general jurisdiction; this argument I must say is not without some ground, but I do not mean to say that my mind is satisfied that it is so. I do not mean to say, that if we see in point of fact, that a party has no right to remain on the burgess-roll, and that the facts have been brought in a proper manner before us, that we should not be authorised to strike him off, although there was no notice of objection in the Court below. At all events, in the present case the matter has not been brought before us so clearly as to enable us to decide this point.

As to the notice; it does strike me that there is much weight in the objection raised to it; and my mind is not satisfied that the power given by the statute to a burgess to make an objection, and have a party removed from the roll, authorised him to exercise the power not by himself, but to authorise another to do the act for him. I can see inconvenience, incongruity, perhaps I might say absurdity, in holding a doctrine of such a description. Every burgess might have a right to object, and the Legislature might give him authority to do so; but it does not follow as a necessary consequence that he shall have a right to delegate that power, not for a particular occasion, but to give all the power to another person, which the Legislature had delegated to him. I am, however, of opinion that the rule to show cause should be allowed, without interfering with the right to apply for a *quo warranto*. I only say that the case has been brought before us in such a way as that we ought not to grant the rule upon the grounds stated, and that therefore the cause should be allowed.

CRAMPTON, J.

If this application had been brought before the Court simply on the ground that Baxter was usurping the office, the Court would give an

opinion whether, under the 50th section of the statute, they had an original or an appellate jurisdiction; but the motion is not brought before us in such a way, upon affidavits alleging the disqualification of the party sought to be removed, as to induce us to use so strong a measure as that sought for. A case has not been made to my satisfaction, to enable me to say I would concur in a rule for that purpose. We have here a summary jurisdiction put in the place of a solemn proceeding by *quo warranto*, for the purpose of saving expense; but the parties must bring the case satisfactorily before the Court to warrant them in making the order sought for.

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PERRIN, J.

I concur with the other Members of the Court. I think a serious question has been raised on the 50th and 9th sections of the Act, in reference to the jurisdiction of the Court; but I refrain from intimating any opinion on that question. As the case has been brought before the Court, I am by no means satisfied that a power was given to a burgess to confer upon another what the Legislature had thought proper to confer upon him.

Cause allowed with costs.*

* Vide *Toms v. Cuming*, 9 Jur. 90.

THE QUEEN at the prosecution of BOLES TAYLOR,

v.

HENRY HANNAN and several others.*

June 7.

In this case a conditional order had been obtained, directing the names of the several defendants to be erased from the burgess-roll of the city of Cork; and that the Town-clerk of said borough should attend in Court for the purpose of the said names being erased therefrom; and for the costs of the application.

The person objecting to a burgess under the 45th sec. of 3 & 4 Vic. c. 108, must be a *bond fide* objector, but it is not necessary in order to give him a right to

The conditional order had been obtained on the affidavit of Boles

make the objection, that he should have had positive knowledge of the facts upon which he made the objection at the time he signed the notice.

* Absente CRAMPTON, J.

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Taylor, which stated that he was a burgess for the said borough; that the Town-clerk had prepared the burgess lists from the rates made for the relief of the destitute poor; that after the said burgess lists had been prepared and posted, deponent ascertained from his own knowledge of the circumstances, that some of the persons returned on those lists were not entitled to be enrolled as burgesses; and was informed by trustworthy persons that several others, whose names appeared on the lists, were not entitled to be enrolled: that notices of objection were prepared and filled for the several persons by name, against whom valid objections were believed to exist; and three copies of each notice, with the name of the individual objected to inserted therein; one copy for the Town-clerk, one for the individual objected to, and one to be retained by the person serving the same, were placed in deponent's hands by respectable persons, who informed him, what he believed to be true, that they had used endeavours to ascertain whether those were valid objections against such persons, and had satisfied themselves that such objections did exist: that being himself aware that there were, as to some of the persons named in such notices, great and sufficient causes for objection as to the enrolment of their names as burgesses; and having been, as to the others, assured by persons on whose representations he fully relied, that there were valid causes of objection against them, deponent signed the three copies of such notices of objection to the enrolment of such persons, being persons returned in the burgess list by the Town-clerk, and whose names were not on the former burgess-roll of said borough: that he would not have signed such notices were he not satisfied that there were just grounds for believing that the respective parties to whom they referred were not entitled to be enrolled: that the notices were duly served, and that the revision took place before the Mayor and Assessors of said borough; and that he authorised John M'Donnell, a burgess for said city for the last year, to appear at such revision on his behalf to sustain the objections given by the notices: that he was informed and believed that upon calling on for revision the name of one of the persons returned on the burgess list, and against whom he had returned a notice of objection, and the service of the notice and deponent's signature thereto being proved, and John M'Donnell having appeared in support of the objection, persons then present on behalf of the person objected to, required that deponent should personally appear and prove before the Mayor and Assessors that he had an objection in his mind at the time he signed the notice of objection; and on the other hand, it was contended that the act of signing the notice and the service of it, and the appearance of M'Donnell in support of the objection were proofs, if any were necessary, that deponent had an objection in his mind at the time of signing the notice, but the Court of Revision decided that such proof was insufficient, and that it was necessary to go further: that M'Donnell then produced Michael Hodder, one of

the persons from whom he had received information relative to the persons objected to, and he being examined, proved that he used careful means of ascertaining who were the parties returned on the roll to whom there were good and valid objections; and that from the information he had received, he had reasonable ground for believing such objections did exist; and that he had placed in deponent's hands the notices of objection, and had told deponent there were good and valid objections against such persons: but notwithstanding such proof, the Mayor and Assessors refused to require that the right of the person objected to should be proved, but admitted him to be enrolled, because deponent had not appeared and submitted to be examined in support of the objection: that in consequence of this decision, deponent appeared before the Revision Court and proved that before he signed the notices there were good and valid objections against the several persons in respect of whom notices of objection had been prepared as aforesaid: that the deponent was cross-examined at great length as to the several persons in such notices, and as to his having objections then in his mind; and the Court, notwithstanding, refused to attend to the notices so signed by deponent, and admitted those persons as if no objection had been made, and refused to hear evidence of their want of qualification.

There was another affidavit made by Michael Hodder, confirming the statements in the affidavit of Taylor.

The affidavits filed as cause against this conditional order, stated that it had been a rule acted on at the revisions, that no person should be deemed legally objected to, unless at the time of making the objection the person objecting entertained in his mind a ground or cause of objection to the individual objected to. There was also an affidavit of a newspaper reporter contradicting the statements made by Taylor, as to having had in his mind or heard of any objection at the time of signing the notices; and that in consequence of the statements of Taylor being so contradictory, the Assessor rejected his evidence.

Mr. *Brewster*, Q. C., with whom was Mr. *R. J. Lane*, now moved to make absolute this conditional order.

The question in this case turns on the 45th section of the Municipal Corporation Act; the Mayor having held at the revision that the persons signing objections to a burgess should appear in person in support of that objection, and prove that he had a valid objection in his mind at the time; the statute does not require this objection should be well founded, but when it appears that a person has signed an objection, the party objected to must appear and support his claim: the 45th section provides that "when the name of any person inserted on any one of the lists shall have been duly objected to, and the person objecting shall appear, by himself, or by some one on his behalf, in support of such objection,

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Mr. *Pigot*, Q. C., and Sir *Colman O'Loughlen*, contra.—This case is precisely similar to *Baxter's case*.—[PERRIN, J. In that case we decided that a party could not depute to another his authority.]—Yes, but the Court was also of opinion that unless the case was made clear as to the disqualification, they would not act on it. *Baxter's case* was decided on the ground of the inconsistency and inconvenience that would be caused by giving power to a party to put all the burgesses on proof of their title. The policy of the Act was that frivolous objections should not be made incumbering the revision. If a party was allowed to sign objections not his own, but those of other persons, he would exercise no act of volition; thus in the case of a notice to quit, there must be intent: *Doe d. Mann v. Walters (a)*. Upon the words of the section the party cannot be considered as objecting, unless he has present in his thoughts the objection he makes against the individual, and that the objection is his own, not that of another person. It is clear that this, upon the strict terms of the section, is not the *bonâ fide* objection of Taylor, and the Court cannot say whose it is. This was a contrivance for the purpose of enabling some persons who had made inquiries on the subject, to evade the responsibility of putting their names to the objections; for the schedule carefully provides that there should be a public statement of the name and place of abode of the person objecting, to fasten upon him this responsibility. Again, the case made here for the summary interference of the Court, is upon mere hearsay.—[PERRIN, J. Suppose the notice was *bonâ fide* given, and that the other party were ready to support the objection, does it not throw the proof of the qualification on the claimant? and therefore, all that was necessary to lay before the Court was, that the party was improperly admitted.]—It is only under the 50th section the Court have jurisdiction to decide this; and that enacts, "That the right of every "person who shall have been admitted and enrolled upon the burgess- "roll to be admitted and enrolled, may be questioned by any burgess "by appeal in like manner," &c. Now, an affidavit to ground an appeal under the section is insufficient on hearsay and belief. If it were not for that section the Court would have no jurisdiction but upon a *quo warranto*.—[PERRIN, J. This is in substance a *quo warranto*.]—No, for there would be no appeal from the decision in the present case.—[PERRIN, J. I should be slow to hold that the Court has not a summary jurisdiction, although the objection was not made in the Court below. I think that summary power was given in the place of a *quo warranto*, however it is not necessary now to decide that question.]—If the Court has no power to strike off a party who was not objected to in the Court below, neither can they have the power where there was no

(a) 10 B. & C. 626.

valid objection. The 50th section shows clearly that this Court is only a Court of appeal, and therefore it has no jurisdiction which the Court below had not, and the Court below had no jurisdiction to strike a party off unless duly objected under the 45th section.—[PERRIN, J. How do you consider it is with respect to freemen?]—There is no section in the Act which requires that in the case of freemen there should be a notice of objection.

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Mr. Lane in reply.—This is the only way an appeal could be brought before the Court.—[PENNEFATHER, C. J. This is a summary jurisdiction given to the Court by this Act, and I do not see what authority we have to interfere except upon an appeal, just as an appeal is brought from the Assistant-Barrister's Court.]—A formal appeal is not necessary; the Court has power to decide this on motion, that is the meaning of the word appeal; there is no other mode of proceeding given by the statute.—[BURTON, J. One would rather suppose that an appeal should be entered from the Court appealed from, in order to show that there was an appeal, and that it should state the grounds upon which the parties did appeal. The Court of Revision examines witnesses *vis à voce*; that evidence ought to be taken down, and the Court should have it before it: at all events it would lead to a good deal of difficulty to have it reported on affidavits.]—There is no direction in the Act, that the evidence should be taken down. The 49th section shows that a formal appeal is not necessary, for that section provides that an application may be made to this Court for a *mandamus* to put a burgess on the roll whose name has been rejected or expunged.—[BURTON, J. In that section the word "award" is used; if under that section the Court were to award a *mandamus*, they would have the case before them upon a return to that *mandamus*; but here the Court is called on to decide questions which arise upon a *vis à voce* examination of witnesses upon affidavit.]—The Court below refused to entertain the evidence, and the Act requires that the party should prove his qualification. The Court below were wrong in not inquiring into the qualification: they put those persons on the roll not because there was no objection, but because he could not swear that he had a specific objection. It is impossible that the Act intended a formal appeal, because the Court of Revision has been dissolved, and there is no person to whom the appeal could be directed.

PENNEFATHER, C. J.

In this case I must confess, that my mind has fluctuated very much in the progress of the argument, and I am not at present, upon the documents which have been laid before us, at all prepared to say what would be the proper course to be finally adopted, as the case has not been satisfactorily brought before us. There is a great deal of reason to be dissatisfied with the account given by Taylor, upon his very long

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examination and cross-examination before the members of the Court of Revision, the result of which has been detailed to us by the newspaper reporter, whose accuracy we have no reason to suspect : on the other hand, if you look into the affidavit made by Taylor, in reference to the present motion, the conclusion which the facts of the case furnish with regard to his conduct is not satisfactory. The 45th section of the statute provides, that certain persons shall be put upon the roll by an officer of the Court, not for the purpose of being finally admitted upon the roll, but for the purpose of having the claim of each investigated ; that claim was to be decided by the Mayor and two Assessors, the Judges of the Court of Revision, whose business it was to investigate the claim of the person who had been put upon the roll. If a party had been put upon the roll the preceding year, that establishes a *primâ facie* right to be continued on it the ensuing year. But suppose, as in the present instance, the claimant was not on the roll the year before, what then is the course pointed out by the Act, to be pursued by the members of the Court of Revision ? The Act says, " The Mayor or Barrister shall "insert in such lists the name of any person who shall be proved, to the "satisfaction of the Court, to be entitled to be enrolled in the burgess-roll according to the provisions of this Act, and shall retain on said list "the names of all persons to whom no objection shall have been duly "made and sustained." Now, it would appear from this, that it was the duty of the members of the Revision Court, before they made out the list, to call for proof to their satisfaction of the party's being entitled to be enrolled, and I do not find that any such proof was called for or gone into. In the first place, I should say, the members of the Court of Revision did not do the duty the Act required, they seem rather to have admitted those persons to remain on the roll without inquiry, consequently without proof that the party was entitled to be enrolled ; that is the reason why there is something to be said on the side of the person making the objection. That person makes an objection to several individuals, and he signs his name to those objections, and three notices of them are served. Now it is to be supposed that those notices were signed by Taylor, and served upon those three persons, according to the intention of the parties and of the Act. Then, what follows after ? The section goes on to say, " And when the name of any person "inserted in any one of the said lists shall have been duly objected to, "and the person objecting shall appear, by himself or by some one on his "behalf, in support of such objection, the Court shall require proof of "the qualification of the person so objected to ;" that imposes on the Court below, upon the objection being duly made, the necessity of going into an investigation of the qualification, such investigation to be made in the presence of, or on the notice of the party making the objection. It then proceeds, "and in case the qualification of such person shall not "be proved to the satisfaction of the Court, the Mayor or Barrister, as

"the case may be, shall expunge the name of every such person from said "lists." Now, except in the case where a previous opposition was made, *prima facie* the case was in favour of the claimants; this investigation is a preliminary matter imposed on the Court, in all cases of new parties who had not been on the list before. These views would lead one to go a great way in support of the present application, but at the same time the Court is placed under a difficulty from the particular situation in which Taylor stands with reference not merely to his affidavit, but his examination and cross-examination. I think that Taylor has substantiated his right to be considered a *bonâ fide* objector, and therefore, I do not think this case governed by the decision of the Court in *Baxter's case*, in which the Court was of opinion that there was not a *bonâ fide* objector, but one who had merely delegated his authority; the Court there did not look upon him as a *bonâ fide* objector, but considered that his name was used without his knowing any thing whatever on the subject.

Now, I think the affidavit of Taylor places him in a different position from Baxter. It was not necessary, in order to give him a right to make the objection, that he should have had positive knowledge of the facts upon which he made the objection; that is, he was not bound to prove them on oath; he had a right, having informed himself to his satisfaction, to come to the belief that there was a *bonâ fide* cause of objection against the person in question. Having done so, and made up his mind to sign the objections to the admission of those persons; and having come to that conclusion, he caused those three notices to be signed; I therefore cannot but look on him as a *bonâ fide* objector. My Brother Perrin does not view the case in the same way I do; he does not see sufficient reason to say that there is a distinction between *Baxter's case* and the present. He thinks upon the whole account given by the reporter with regard to the examination of Taylor, that he cannot look upon him as a *bonâ fide* objector; and the Court are all of opinion that the Court of Revision had a right to say there ought to be a *bonâ fide* objector; but inasmuch as that Court does not appear to have discharged the preliminary duty, and has permitted the name to be placed on the roll without inquiry, the Court are of opinion that it is not a case to conclude the parties by any thing which, up to this time, has taken place. We are disposed to let the matter stand, either by lodging an appeal, which, is open to the parties to do, or to make no rule, without prejudice to the parties appealing, with liberty to the parties to lay before the Court such information as they may think proper.

At present, I say no rule, without prejudice.

BURTON, J.

I concur in the order that there should be no rule, without prejudice to the party appealing. I only wish to say that I have a great deal of difficulty; in truth, my doubts upon the subject are not yet removed, as

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to the proper course in which this proceeding should be brought before this Court. Properly speaking, it was intended to be by appeal ; but I am not satisfied with the mode of bringing this appeal from the Court below before this Court, on the affidavit of a party to that appeal. In all cases of appeal, the jurisdiction of the Court is not affected except by something that touches that jurisdiction ; that is, what has been made the ground of the decision in the Court below is brought before the Court of Appeal by some formal proceeding in an authentic shape : but it is not so in the present case. We have to depend on the affidavits of the parties interested. Now, it strikes me that this proceeding is so unusual, and so different from the general course, that I cannot say that I am perfectly satisfied with it.

The power of decision has been made the subject of appeal, and I cannot but think that some way ought to be adopted to give the Appellate Court an authentic account of the proceedings in the Court below ; however, as this case at present stands, I concur in the course that has been suggested by my Lord Chief Justice.

PERRIN, J.

I concur in the course that has been suggested. The Court of Revision have decided that Taylor was not a real objector ; that he was an instrument for signing notices prepared by others, the contents of which he was not acquainted with. I think it a very reprehensible practice to use the name of one single person to serve who does not originate the proceeding, which is not his own spontaneous act ; the objection ought to come from the party himself ; and we held in *Baxter's case* that he could not transfer that right to another ; and I think that we held it should be his own act, as a proper check against imposition : this Court has an authority to control abuse which might be made of the power given by the Act, which is not otherwise controlled. It might be made an instrument of great annoyance, and might militate against the due exercise of the Act ; for if it was made a practice to serve notices against every person upon speculation, no person would go to defend himself, and it would thus operate against having a proper roll. I cannot adopt the authority which says it is the same thing whether he signs a blank warrant or one which he has not read. I do not think it necessary that he should have a valid objection in his mind at the time he signs the notice ; it is enough, if at the time of his examination, the objection is supported. I believe at the time of the passing of the Act, it was a subject of consideration how this matter ought to be brought before the Court ; but I always considered an affidavit sufficient to get leave to file a *quo warranto*, if not encountered by contrary proof. The word "appeal" has been used rather loosely in the Act.

No rule.

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Cychequer Chamber.

DANIEL in replevin v. BINGHAM.

June 10.

REPLEVIN.—To the declaration, which was in the common form, the defendant filed two avowries, avowing the taking of the plaintiff's goods in distress for £120 due for one and-a-half years' rent to him for the *locus in quo*, at a yearly rent of £80. To each of these avowries the plaintiff pleaded two pleas, the first of which is alone material to be considered, and were in effect the same—viz., that before, and at the time of making the distress for rent, the plaintiff was in possession of the *locus in quo*, and that the defendant "did not at the time of making such distress, "or at any time before, deliver to the plaintiff a particular in writing of "the rent demanded, specifying the amount thereof, the time or times "when the same accrued, and the person by whom, or by whose authority, the distress was so made, according to the form of the statute "(6 & 7 W. 4, c. 75, s. 6)* in that case made and provided." To each of these pleas a special demurrer was put in, showing for cause, the immateriality and narrowness of the issue—the delivery of the particulars in writing being only negatived *at or before* the time of making the distress, and not after, or before the issuing of the writ of replevin. The plaintiff having joined in demurrer, the case came on to be argued before the Court of Common Pleas in Hilary Term 1842, when the Court allowed

The extent of the jurisdiction given to the Assistant-Barristers by the 6 & 7 W. 4, c. 75, in replevin cases, is to be governed by the amount of the reserved annual rent, and not by the amount of the rent distrained for, and therefore, a plea of the non-delivery of the particulars of distress required by the 6 & 7 W. 4, c. 75, s. 6, to an avowry of distress for £120 due for one and a-half years' rent, was held to be a bad plea.

Quære—Is the fact of the non-delivery of such particulars pleadable in bar to an avowry?

* 6 & 7 W. 4, c. 75.—"And be it further enacted, that the respective Assistant-Barristers in Ireland shall, and they are hereby authorised and empowered, to hear and determine, within their respective jurisdictions, all actions of replevin relating "to distresses for rent between landlord and tenant, when the rent for, or in respect of "which, any distress shall be, or ought to have been made, shall not exceed £50 in "amount or value." Section 5.

"And be it enacted, that in all cases of distresses for rent, the person making any "such distress shall deliver to the person in possession of the premises, for the rent of "which such distress shall be made, or in case there shall not be any person found in "possession, shall affix in some conspicuous part of such premises, a particular in "writing of the rent demanded, specifying the amount thereof, the time or times when "the same accrued, and the person by whom or by whose authority such distress is "made." Section 6.

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the demurrer (*dissentiente* FOSTER, J.), deciding, on the general ground, that it was not necessary that a landlord distraining for rent should deliver the particulars of distress required by the 6 & 7 W. 4, c. 75, s. 6, unless in cases falling within the jurisdiction of the Civil Bill Courts.* The plaintiff having taken out a writ of error, the case now came before this Court.

Mr. *Francis Fitzgerald* and Mr. *Napier*, for the plaintiff in error.— There are three questions in this case to be decided by the Court ; first, whether the 6 & 7 W. 4, c. 75, s. 6, is applicable to every case of distress for rent? secondly, whether it is mandatory or directory? and thirdly, whether the omission to give the notice, as stated in the pleadings, renders the taking unlawful, and disentitles the landlord to a return of the goods? The first of these is a question of construction, and the rule is, as laid down by Alderson, B., in *The Attorney-General v. Lockwood* (a), that statutes are to be construed “according to the plain, “literal and grammatical meaning of the terms in which they are expressed, “unless that construction leads to a plain and clear contradiction of the “apparent purpose of the Act, or to some palpable and evident absurdity;” *Rex v. Frost* (b). Applying that rule in this case, the 6th section of the Act in question is perfectly plain and general in its terms; the onus, therefore, lies on the defendant to show that the enactment is restricted to a certain class of cases. That it occurs in a Civil Bill Act is no reason; for the 1 G. 4, c. 41, is a Civil Bill Act, as appears by its title, and the 1st section; and yet the 2nd section extends to all cases. So as to costs in trespass, 2 G. 1, c. 11, s. 14. There were certain mischiefs connected with distresses to be remedied at the time of passing this Act, *e. g.*, a party distrained for one cause and avowing for another; *Grenville v. The College of Physicians* (c): or a distress might have been made by one person, and adopted by another: *Duncan v. Meikleham* (d); or the tenant might be desirous of saving expense by tendering the rent, which he could not do while in ignorance of the party distraining, and cause of distress. These mischiefs extend to all cases of distress, and would be remedied by the construction given by us to the Act, but would remain as they were if that suggested by the other side is adopted. Again, the 7th section of the Act which provides for the appointment of replevinders, who are appointed to “grant replevins and make deliverances of all distresses,” shows the intention of the Legislature; more especially as, by reason of the repeal of the 10 Car. 1, *sess.* 2, c. 25, s. 3, and 3 G. 2, c. 9, s. 4, under which Sheriffs’ deputies were appointed for the same

(a) 9 M. & W. 398.

(b) 9 C. & P. 169.

(c) 12 Mod. 387.

(d) 3 C. & P. 172.

* *Vide* 4 Ir. Law Rep. 285, and 5 Ir. Law Rep. 56.

purposes, have been repealed by the 16th section of this same Act. The replevin jurisdiction begins at the 5th section, and is expressly confined to cases where the rent for which the distress *ought to be made*, shall not exceed £50. Then follows the 6th section, which is general in its terms, and without any restriction; as also the 7th; while in the 8th, where the Civil Bill jurisdiction is taken up, there is a return to the restrictive language. Then in the 16th section, the 7 & 8 G. 4, c. 69, which gave a jurisdiction to Magistrates in distresses for rent under £10, is repealed, and the two Acts respecting the appointment of deputies; which shows that the Legislature considered that they had provided for all cases. It is said, that the provisions of the 22nd section relating to executors, which are equally extensive in language as those of the 6th section, require a similar restriction. But there is no necessity for any restriction even in that section; for it may be necessary to examine any executor, no matter what the amount of the assets, to ascertain their real value; and therefore "any executor" may be summoned.

Secondly.—Assuming that the enactment applies to all cases, the language and object show it to be mandatory: *Crisp v. Bunbury* (a); *Steward v. Graves* (b); *Coroner of Stafford's case* (c); *Murphy in replevin v. Butler* (d). If not mandatory, how is a party, a stranger, perhaps, to know the defendant, the cause of distress, or the amount claimed, so as to adopt the proceeding by civil bill, which is only given in cases of distresses for arrears not exceeding £50? Suppose, then, that by reason of the want of notice, the tenant is obliged to resort to the Superior Courts, or cannot make a tender in time; the landlord has judgment, puts the tenant to great expense, and avoids personal examination; and the remedy proposed for this injury is (as suggested on the other side) a special action on the case. The grievance thus being the expensive necessity of an action in the Superior Courts; and the remedy, a second action of the same description; and while the landlord has a return of the goods, the tenant is to have damages for it: *Smithwick v. Pearson* (e).

Thirdly.—Supposing the 6th section general and mandatory, the non-compliance disentitles the defendant to a return of the goods; or, in other words, the irregularity is pleadable in bar to the avowry. A defendant avowing, and claiming a return of the goods, is bound, in selling, to make out a title *in omnibus*: *Goodman v. Ayling* (f). If therefore, at common law, he was guilty of any thing unlawful before impounding, or, under the statute, before sale completed, the distress was vitiated, and he could not make title *in omnibus*. Tender before

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(a) 1 M. & Scott, 606.

(c) 2 Russ. 475.

(e) 2 Jones, 462.

(b) 10 M. & W. 719.

(d) Jebb's Res. Cas. 321.

(f) Yelv. 148.

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impounding is a good plea in bar: *Evans v. Elliott* (a); *Walter v. Newball* (b); *Bro. Ab. Avowry*, pl. 6; and if a tender be prevented, or rather the opportunity of making it, by the act of the defendant, he cannot avow for a return. A distress in the night cannot be avowed for: *Fitz. Ab.* 137; and the reason given in *Gilbert on Distresses* (Impey's ed.) 49, is "because the tenant hath not thereby notice to make a tender of his rent, which probably he might do to prevent the impounding of his cattle." There is no mode of effecting the policy of the Act, but by making the notice part of the landlord's title to a return; and, therefore, the absence of it is pleadable in bar. The notice, too, ought to be at the time of the taking: *Com. Dig. Pleader*, 3 K. 20; *Brown v. Mutherwell* (c); *Orr v. Stephenson* (d). A sale under the statute in England without notice, renders the party selling a trespasser: *Walter v. Newball*; *Com. Dig. Trespass*, C. 2; *Higgins v. Goode* (e). As for the case in 2 *Inst.* 131,* a distress in the highway was allowable at common law: 17 *Edw.* 3, p. 43, ca. 31; and the enactment against it was for the public good; and the reason given in *Beecher's case* (f), for the fact not being pleadable in bar, is, that "the King would thereby lose his fine." *Fitz. N. B.* 90, n. b, which confines the principle to that particular case; and is not an authority for any similar irregularity on the part of the defendant not being pleadable in bar.

Mr. J. D. Fitzgerald and Mr. J. J. Murphy, Q. C.—First, the enactment contained in the 6th section of the 6 & 7 W. 4, c. 75, is restricted to these cases of replevin which are within the jurisdiction of the Civil Bill Courts. This is manifest from the title of the Act—viz.: "An Act to extend the jurisdiction, and regulate the proceedings of Civil Bill Courts in Ireland." The same construction follows, also, from the preamble, which is a key to the meaning: 4 *Co. Inst.* 330; *Ryan v. Rolle* (g); *Mason v. Armitage* (h). The 5th section gives jurisdiction in cases where the rent does not exceed £50; and the 6th section is connected with it by the copulative "and;" and should be read as if the word "such" were introduced before the words "all cases of distress for rent." Moreover, the word "all" may be satisfied by referring to the previous state of the law under the 7 & 8 G. 4, c. 69, and which is repealed by the 16th section of this Act. Again, the appointment of replevinders under the 7th section may be considered to be limited to

(a) 5 Ad. & E. 142.

(c) 1 C. & D. 468.

(e) 2 C. & J. 367.

(g) 1 Atk. 174.

(b) 4 Mod. 395.

(d) 2 C. & D. C. C. 228.

(f) 8 Rep. 60, b.

(h) 13 Ves. 35.

* This case was cited by BRADY, C. B., as an authority against the want of notice (if required at all) being pleadable in bar.

cases within the Civil Bill Jurisdiction. The argument which would give an universal import to the words of the 6th section, would likewise extend the provisions of the 22nd section to every executor or administrator, no matter what the amount of the assets, and whether within the Civil Bill jurisdiction or not.

Secondly.—The provisions of the section are only directory; negative words are necessary to make it mandatory, and there are none such here: *Rex v. Leicester* (a); *Doe d. Phillips v. Edwards* (b); *Rex v. Birmingham* (c); *Lessee of the Governors of St. Patrick's Hospital v. Dowling* (d). At all events, it was not necessary that the particulars should have been delivered "at or before the time of making the distress," as there is nothing in the Act to show that a delivery at a reasonable time after would not have been sufficient.

Thirdly.—Even if the 6th section does apply to all cases of distresses for rent, the plaintiff must maintain that the non-delivery of the particulars required thereby, makes the distraining party a trespasser *ab initio*; for otherwise, the taking having been lawful, the plea is no bar to the avowry, and we must have judgment on the demurrer. But *Woodcroft v. Thompson* (e), *Shopcott v. Winford* (f), *Symes v. Moody* (g), all show that the Courts will not hold a party to have been a trespasser *ab initio* for a mere non-feazance; nor will a mere irregularity in making the distress have such an effect, as was decided in the *Six Carpenters' case* (h). In fine, the omission in this case is a mere irregularity, and as such, and like the case of a distress on the highway, cannot be pleaded as a bar to the avowry.

PENNEFATHER, C. J.

In this case of *Daniel v. Bingham*, the Court has taken a great deal of pains with the consideration of the subject, which was one in every way deserving of the best consideration which the Court could give it, not only from its general importance and the ability with which it has been argued, but from the great extent of the interests which are concerned in it. It was, upon every account, a case worthy of the highest consideration, and the Court has bestowed upon it as much pains, as in my experience, has ever been bestowed upon any case that has come before the Judges. We have arrived at a conclusion, and that too, without a difference of opinion existing among us; and I have now to announce the judgment of the Court as subsisting without a division; and that is, that we are unanimously of opinion that the judgment of the Common

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(a) 7 B. & C. 12.

(c) 8 B. & C. 29.

(e) 3 Lev. 48.

(g) 2 Str. 856.

(b) 3 Tyrw. 339.

(d) Bat. 296.

(f) 1 Ld. Raym. 188.

(h) 8 Co. 290.

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Pleas upon the subject matter of the present appeal, should be affirmed. The Judges are all agreed that the notice required by the 6th section of the Act, out of which this case arose, need only be given in cases within the Civil Bill jurisdiction.

A great majority of the Judges (among whom I am one), concur in affirming the judgment of the Court of Common Pleas, for the reasons assigned by the Lord Chief Justice of that Court in pronouncing and delivering his judgment; I mean those reasons which were assigned by him in the printed report of the case, as reported in the 4th volume of the *Irish Law Reports*. Some similar reasons, but not to the same extent, nor involving the variety of questions on this Act which the present case furnishes, might be also found in the case of *Daly v. Lord Bloomfield*, which is reported in the 5th volume of the *Irish Law Reports* as delivered by myself. Some of the Judges have come to the same conclusion as myself, and which as I have announced is the unanimous opinion of the Court, on somewhat different grounds; or, at all events, on grounds not altogether appearing either in the judgment pronounced by the Lord Chief Justice of the Common Pleas in this case in the Court below, or in the judgment pronounced by myself in the case of *Daly v. Lord Bloomfield*. But, though they have come to the same conclusion, and so concur in the unanimous judgment of the Court, yet, as some of them were more or less influenced by different reasons, and have arrived at the same conclusion through a somewhat different process, it is very probable that they may be disposed to assign their respective reasons when they come to deliver their opinions, which those who concur in the reasons assigned by the Lord Chief Justice of the Common Pleas in the Court below, are satisfied to pass without further observation; inasmuch as the reasons on which they rely appear already in print, and the public are not in want of being informed upon them.

I have to state further, that inasmuch as the consideration and construction of this Act of Parliament (6 & 7 W. 4, c. 75) is a matter of very general interest, operating upon the entire country, it has induced them to give the case every possible discussion and consideration, so as to be sure that they form one concurrent opinion with regard to the construction of that Act. In their deliberations upon the questions raised on this record, they found it necessary to discuss, and to determine the extent of the Assistant-Barrister's jurisdiction in replevin; and we are all of opinion that the extent of that jurisdiction is the amount of the annual rent reserved upon the lease. That is the criterion, which will not be subject to variation in different cases, and there will be an uniform mode of construction, defining the extent of the Assistant-Barrister's jurisdiction in all cases from henceforth. We are of opinion, as I said, that the extent of the jurisdiction is to be governed and decided by the

amount of the annual rent reserved in the lease, and not by the amount of the sum actually due. The latter would make a very fallible and varying criterion, which after a lengthened trial might result in this: that the Court would have arrived so far, and no further, than to find that they had no jurisdiction. That inconvenience, not to say absurdity, will be prevented by the rule of construction now adopted by all of the Judges: it will be no longer the subject of uncertainty and inconvenience; and for these reasons I have to announce the judgment of the Court of Error, affirming the judgment given by the Court below, with ordinary costs.

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DOHERTY, C. J.

I concur in the judgment which has been pronounced by my Lord Chief Justice.

BRADY, C. B.

I also concur in the judgment of the Court, that the judgment pronounced in the Court below should be affirmed; but as my Lord Chief Justice has observed, that some of the Judges (among whom I am one), have come to the conclusion in which we agree, on grounds different from these stated and relied on by him, I shall shortly state the reasons which have influenced me in arriving at that conclusion.

I confess that the main inducement for my concurrence in the judgment of this Court, is the state of the pleadings on the record. I do not think that the pleas in bar can be sustained; and I have searched in vain for a precedent of any plea in an action of replevin stating matter of irregularity in the making of the distress as an answer to an avowry. In the case in *Fitzherbert's Abridgment*, referred to by Mr. Napier, of a distress in the night, the question did not arise in an action of replevin, but in an action of trespass; and so it appears in the Year Books (*M. T. Hen. 7, ca. 18, E. T. 10 Ed. 3, ca. 37*). The plea, therefore, wants authority and precedent.

I am also of opinion, that the true construction of the Act in question (6 & 7 W. 4, c. 75) is, that the notice mentioned in the 6th section is not required in cases outside the limits assigned by the Legislature to the jurisdiction of the Assistant-Barrister's Court. The Act regulates the jurisdiction, not by amount of the rent claimed, or the sum demanded on foot of the rent, but by the amount of the reserved annual rent, on foot of which the sum for which the distress has been made was demanded. The terms of the enactment are, "That the respective Assistant-Barristers in Ireland shall, and they are hereby authorised and empowered to hear and determine, within their respective jurisdictions, all actions of replevin relating to distress for rent between landlord and tenant, where the rent for or in respect of which any distress shall be or

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"ought to have been made, shall not exceed £50 in amount or value;" that is to say, when the rent, in respect of which the distress is made, or in other words, the annual reserved rent, shall not exceed £50. This construction prescribes a clear and certain limit for the Assistant Barrister's jurisdiction, and capable of easy ascertainment; but if it were to be regulated by the amount of the arrears due by the tenant to his landlord, to be ascertained after a long inquiry, and in cases of large tenures, as contended for, the construction would be attended with great inconvenience and difficulty in practice, and could not, in my opinion, have been intended by the Legislature. The former Act of the 7 & 8 G. 4, c. 69, which is repealed by the Act under our present consideration, fortifies this construction. That Act gives to Justices of the Peace jurisdiction in cases of distress for rent, where the annual rent does not exceed £10. Now, if it had been intended by the Legislature in the later Act, to make an alteration in the principle by which the jurisdiction is to be tested, they would, in repealing the former Act, have so expressed their intention; and not having done so, we must presume that their intention was to leave the law in that respect unaltered. This view of the matter is further strengthened by the schedule annexed to the Act, which in one instance regulates the fees payable to the defendant's attorney, by the amount of the annual rent, and not by the amount of the rent sought to be recovered. On these grounds, I am of opinion, that the notice required by the 6th section, being confined to cases within the Assistant-Barrister's jurisdiction, that is to say, to cases in which the reserved rent does not exceed £50, this demurrer must be allowed.

BURTON, J.

I concur in the judgment which has been pronounced by the Chief Justice, and for the reasons stated by him. And I would add, that I also concur in the judgment, and the reasons given for it by the Court of Common Pleas in the printed report of this case.

PENNEFATHER, B.

I do not think it necessary to say much on the subject of the case now before us, concurring as I do in the unanimous judgment of the Court. I think it right, however, to observe, that my concurrence in the judgment of the Court mainly depends upon the two grounds suggested by my Lord Chief Baron. In my opinion, the construction to be put upon this Act, with regard to the limit of the jurisdiction of the Assistant-Barrister, is most material to be come to in the decision of the principal question in this case; for if that limit is not to be ascertained by the clear and definite amount of the rent reserved, but to depend on the amount that might be found to be due on foot of it, I own that I have very great doubts that the notice required by the 6th section could be dispensed with.

Now, it appears clearly, that considering the provisions of the 5th section, and the words that the Assistant-Barristers "shall hear and determine, within their respective jurisdictions, all actions of replevin, &c., where the rent for, or in respect of which, any distress shall be or ought to have been made, shall not exceed £50 in amount or value," that is to say, in money, when so reserved,—or in kind, when it shall be reserved in that manner—I say, on reading this clause, it is clear that the limit of the jurisdiction is the annual reserved rent; and this conclusion is strongly fortified by the consideration of the limit of jurisdiction given to Magistrates by the 7 & 8 G. 4, c. 69, which is repealed by the 16th section of the Act under our consideration, and also by analogy with the amount of jurisdiction conferred on Assistant-Barristers in cases of ejectment; which is regulated by the amount of the annual reserved rent, and not by that which is actually due: and further, I think that this is explained to be the meaning by one of the schedules to the Act, which speaks of remuneration to the defendant's attorney *in respect of the annual value*. The language of this, and the previous clause relating to the recovery of rent on lands, is not to be controlled by words in a subsequent section; and I think, therefore, that without doubt, the amount of the annual reserved rent is the limit of the Assistant-Barrister's jurisdiction.

I thought it necessary to satisfy my mind on this subject before I came to the construction of the 6th section, on which we are to decide. It must be remembered that the words of this section are very general, and that in terms they extend to "all cases of distress;" and I agree with the Counsel for the plaintiff in error, that we ought not, in construing an Act of Parliament, to supply words, unless it clearly appears from the context that words ought to be supplied. Now, if any advantage or reason could be suggested for holding that the notice ought to be given in every case of a distress, we should then be in a position to say, that we would not be warranted by law in supplying words to confine the provisions of this clause to any particular class of cases. Thus, if the Assistant-Barrister's jurisdiction depended upon the amount of the rent actually due and in arrear to the landlord, that would be one reason why it might be of importance that in every case of a distress, notice of the amount demanded, the time or times when the same accrued, and the person by whom or by whose authority the distress is made, should be given to the tenant, in order that he might have the means of judging of the tribunal to which he might resort. I do not say that the notice served would deprive him of the tribunal of the Assistant-Barrister's Court, in case the landlord should untruly and fraudulently make a greater claim than he was actually entitled to; but it might, at all events, be one means of enabling the tenant to judge of the Court in which he might prefer his complaint; and, therefore, if the amount of the rent which is due to the landlord

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were to be considered the limit of the Assistant-Barrister's jurisdiction, it would, in my opinion, be going too far, to hold that the service of the notice in all cases was altogether beside the purpose of the present Act.

It was argued, that the notice in question was necessary on many grounds, and particularly, as I have observed, that it might be useful to the tenant in determining the jurisdiction; but my brother Jackson suggested reasons which appeared to be most satisfactory to all of our minds, that the notice might be intended for other purposes than to test the amount of jurisdiction. The reasons he gave, he will most probably state, in delivering his own judgment, and I shall, therefore, say no more upon the subject. But, notwithstanding that the notice may have been required for other purposes, it would have been useful for the purpose suggested, if the jurisdiction depended on the sum due on account of the rent; and if any case could be suggested in which the notice could be of use to the tenant, we would not, in my opinion, be at liberty to insert words in the 6th section that might restrain it from extending to all such cases. On the whole, I think, that having regard to the policy and object of this enactment, which is confined to cases where the rent reserved does not exceed £50, we may fairly restrain the general words of this section, and construe them as having a limited signification, by the general purview of the Act, without any violation of the principles of construction to which I have alluded.

With regard to the other point which was argued, and which formed no part of the judgment of the Court below, viz., whether the omission to serve the notice would be pleaded in bar to the recovery,—I own, that the inclination, and I may say, the strong inclination, of my mind is, that that the plea in bar is bad, and that it affords no answer to the avowry to say, that no notice of the nature required by the section has been served on the tenant. However, I would not be understood to give any final opinion on that part of the case, as it requires more consideration than I could, under the circumstances, give to it.

TORRENS, J.

I concur in the judgment of the Court, for the reasons which have been assigned by my Lord Chief Justice; and also for the reasons which were given by the Chief Justice and the other Judges of the Common Pleas in the Court below.

CRAMPTON, J.

I am likewise of opinion, that the judgment of the Court below should be affirmed. Whether the limits of the Assistant-Barrister's jurisdiction be the rent reserved, or the rent actually in arrear, I think that the enactment in the 6th section, requiring the particulars in writing, is con-

fined to cases of distresses, which are by this statute brought under the jurisdiction of the Civil Bill Court. I am also of opinion, that the limits of the Assistant-Barrister's jurisdiction are not to be tested by the sum actually due and claimed by the landlord distraining, but by the amount of the annual reserved rent. I therefore concur in the judgment of the Court of Common Pleas, and of this Court.

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PERRIN, J.

In my opinion, the Assistant-Barrister is to hear and determine all actions of replevin where the reserved rent does not exceed £50, without any regard to the amount of the arrears claimed by the landlord; and I also think that the true construction of the 6th section of this Act is, that the necessity for the service of the notice by a person making such distress for arrears, is confined to cases where the reserved rent does not exceed £50. The whole intent, meaning, and policy of the 6th, 7th, and 8th sections show this clearly, and that the Legislature did not intend to provide for any case beyond the objects of the Act, and the Assistant-Barrister's jurisdiction. I do not give any opinion as to the effect of the plea which has been here pleaded in cases within the 6th section. It is enough for me to say, that it does not extend to the present case; and I therefore concur in the judgment of the Court, that the judgment of the Court below should be affirmed.

RICHARDS, B.

I am of opinion that the judgment given by the Court below in this case, should be affirmed; and I have arrived at that conclusion on a careful consideration of the 5th, 6th and other sections of the Act of Parliament in question. I thought it necessary, before making up my mind on the construction of the 6th section, to arrive at an opinion as to what was the limit of the Assistant-Barrister's jurisdiction, viz., whether it was to be determined by the amount of the rent which was to be ascertained as due, or by the amount of the reserved rent. If the rent reserved was not to be the criterion, I am bound to say, that I should not, as at present advised, have been inclined to concur in the judgment of the Court; because, in that case it would, in my opinion, be impossible to work out this Act of Parliament, without holding that the notice ought to be served in all cases of distress for rent. But upon the best consideration I can give the subject, I think that the rent mentioned in the 5th section is the reserved rent; and that that rent, and not the amount that may eventually turn out to be due, is the criterion of the Assistant-Barrister's jurisdiction. The words of that section are, "shall hear and determine all actions of replevin, where the rent for, or in respect of which, any distress shall be, or ought to have been made, shall not exceed £50 in amount or value." Now, I cannot see the use

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of this circuitous phraseology, if it was intended that the amount to be found due should be the criterion of the jurisdiction. But it may well be said, that every distress for rent is made *in respect of the reserved rent*. It may also be not unimportant to notice, that by the schedule referred to by the 47th section, in which fees are given to the defendant's attorney, the reserved rent is mentioned. In one of the items in the schedule, the words are these, "where the amount distrained for shall not exceed the annual sum of £20." If I am right on this point, that in cases where the rent is £50 or under, the 6th section applies, whether the proceedings be in the Court of the Assistant-Barrister, or in a Superior Court, which is all, I apprehend, that it is necessary to decide in this case, it follows, that where the reserved rent is over £50 a-year, the 6th section has no application; and inasmuch as the yearly reserved rent in the present case is £80, I am of opinion that the party distraining was not bound to deliver a particular notice in writing under the 6th section, at the time of making such distress; which, I apprehend, is all that it is necessary to decide in this case.

BALL, J.

I also concur in the judgment of the Court, for the reasons assigned in the printed report of the judgment of the Court below. As to the construction of the Act of Parliament on which this question has arisen, viz., whether the test of the jurisdiction of the Assistant-Barrister's Court is the rent reserved, or rent actually due,—I think it right to say, that it would have been more satisfactory to my mind, before coming to a decision on the subject, if the matter had been more fully discussed by the Court, and at the Bar, than it has been. The proposition was merely stated in the course of the argument, but not at all dwelt on; which is the more to be regretted, as the construction of the Act which tests the jurisdiction by the arrear distrained for, and not by the reserved rent, seems to be more consistent with what has been the general practice hitherto, than the construction which the Court now holds to be the correct one. Under these circumstances, I must confess, that I feel some difficulty in coming to the conclusion that the true construction of this enactment is, that the jurisdiction shall be tested by the rent reserved, and not by the sum for which the distress has been made. However, it strikes me, that the inconveniences which would result from holding that the amount actually due should be the criterion of the jurisdiction, show that it is very unlikely that the Legislature should not have intended to make the reserved rent the criterion; while, on the other hand, the convenience arising from making the annual rent the test of the jurisdiction is so striking as to induce me to come to the conclusion that such is the true construction of the Act. This view is fortified, as appears to me, by the provisions of the 26th section;

because I find there "that it shall be lawful for any legatee of any pecuniary legacy not exceeding £20, charged upon or payable out of any real estate, or any person to whom arrears not exceeding £20 are due in respect of any rent-charge or annuity charged upon real estate, to proceed by Civil Bill against the person entitled to the real estate charged." Thus, where the amount of the arrears is intended to constitute the test of the jurisdiction, the Legislature uses a phrase which clearly and unequivocally expresses that intention, and introduces the word "arrears." Now, looking at the language of the 26th section, and then at that of the 5th section, where the terms used are merely, "where the rent for, or in respect of which, any distress shall be, or ought to have been made, shall not exceed £50;" one must be struck with the difference: and it would seem to follow, that the Legislature not having used the word "arrears" at all in the 5th section, could not have had an intention of giving the same effect to their words in that section, which they have in the 26th section, where they expressly use that word. On the other hand, the language of the 2nd section, which gives the jurisdiction in ejectment cases, when compared with that of the 6th section, might be sufficient to suggest a different result. In the 2nd section the words are "the yearly rent reserved or payable in respect whereof, under such grant, &c., shall not exceed £20;" where the Legislature plainly express their intention to make the yearly reserved rent the criterion of the jurisdiction in unequivocal terms; and it may be said, that if they had the same intention in the 5th section, they would have used the same language; and not having done so, it ought to be inferred that they did not intend the same test in both places. However, though there are considerations, as I have stated, which ought to have weight on both sides of this question, I am inclined to concur in the opinion of the Court as to the reserved rent being the test of the jurisdiction; and the only reason I have had for adverting to the different views that may be taken of the subject, is to express the difficulty which I feel in coming to a sudden conclusion on the subject of the criterion of the jurisdiction. But whether that criterion be the yearly rent, or the amount distrained for, I am of opinion that the judgment of the Court below ought to be affirmed.

LEFROY, B.

I concur in the opinion of the Court, that the judgment of the Court of Common Pleas should be affirmed; and that the criterion of the Assistant-Barrister's jurisdiction is the rent reserved, and not the amount distrained for. I am of opinion, that the Legislature did not intend that the notice should of necessity be served, except in cases within the Civil Bill jurisdiction; i. e., where the yearly reserved rent does not exceed £50. It is enough for me to say, that, concurring as I

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do in these two propositions, they are sufficient to sustain the conclusion that the plea in bar is bad; this not being a case in which the landlord is required to give the particulars, for the omission of which the avowry is supposed to be bad. Another proposition was discussed in the course of the argument; but it is not necessary to express any opinion respecting it, in support of the judgment, in which I concur; and I, therefore avoid doing so—the two propositions which I have stated being sufficient to sustain the affirmance of the judgment of the Court below.

JACKSON, J.

Concurring as I do in the judgment of the Court, and in most of the reasons which have been given by my learned Brethren, I do not think it necessary to enter into a consideration of the subject at any length; at the same time, it may be desirable that I should state, as briefly as possible, the grounds on which I have been led to adopt the construction of the statute which the Court considers to be the correct one. The Legislature, in the enactment of the 6 & 7 W. 4, c. 75, conferred on the Court of the Assistant-Barrister a new kind of jurisdiction, viz., a jurisdiction in replevin cases, which is a form of action peculiar in itself, and differing from all other forms of action within their province; and in doing so, it became necessary for them, in conferring this jurisdiction, to make sure that the parties should be placed in as safe a position in that Court, as they would have been if the remedy had been pursued in the Superior Courts; and it was, therefore, meant, as it strikes me, that the particulars required by the 6th section to be delivered to the plaintiff in replevin, should supply him with the same information which he would have obtained by the avowry of his adversary, when filed, if the action had been brought in the Superior Courts. The particulars required to be specified in the notice manifest this:—they are, “the rent demanded, “specifying the amount thereof, the time or times when the same accrued, “and the person by whom, or by whose authority, such distress is made,”—which are the very matters which are stated on the face of every avowry, viz., the rent, and amount, the gale days, and the name of the party in whose right the distress has been made. Other reasons have been suggested for requiring these particulars to be served, but which I do not consider to be the true reasons; for instance, it has been said, that they are to enable the plaintiff to bring his Civil Bill; but if we compare the particulars required by the document mentioned in the 6th section, with those required in the 8th section, which regulates the mode of proceeding on the Civil Bill, we shall find that they are not the same. In the latter, neither the amount of the rent, nor the time or times when the same accrued, are required; and in one particular only do they coincide, viz., the name of the person by whom, or on whose behalf, the distress has been made. That must be stated in the Civil Bill; but the party cannot be

at a loss to know that in replevin, any more than in any other action; at least, he is not in a worse condition. If I am correct in this opinion, and if the opinion of the Judges as to the amount of the reserved rent being the criterion of the jurisdiction, is correct, the judgment of the Court below must be affirmed; because on the record the plea is bad on general demurrer, the notice not being required except in Civil Bill replevin cases; and showing, as it does, that £120 is due for one year and a-half's rent. The title, the preamble, the several provisions, show that the whole scope and object of this Act was to extend the Assistant-Barrister's jurisdiction only; and not to introduce the important changes into the law of the land which have been contended for by the plaintiff's Counsel; nor do I see that the general construction of this 6th section would in any way aid the Assistant-Barrister's jurisdiction, nor that any other good end could be answered by it. I am therefore of opinion, that the judgment of the Court below should be affirmed.

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Let the judgment be affirmed with ordinary costs.

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(*Queen's Bench.*)

June 10.

Where by the provisions of a statute, substituting one Corporation for another, certain works were necessary to be done prior to the Act coming into operation, and the duty of having these works done devolved on the Town-clerks of the old Corporation, who contracted with the plaintiff for the execution of them; and when a certain mode was provided by the statute for defraying the expenses of those works, which expenses were chargeable on the new Corporation; *Held*, that the new Corporation could not be made liable in assumpsit for those expenses; that the plaintiff ought to have had recourse to the mode pointed out by the Act.

ASSUMPSIT.—This action was brought by the plaintiff against the Corporation of Dublin for work and labour in printing certain documents.

At the trial before Crampton, J., at the Sittings after Trinity Term 1843, it appeared that by the provisions of the Municipal Act, prior to that Act coming into operation, it was necessary that certain lists should be printed; and the duty of procuring those lists to be printed devolved on Messrs. Archer and Dickinson, the Town-clerks of the old Corporation, who employed the plaintiff to print these lists, stipulating at the same time that they should not be held responsible for the expense of the printing.

The learned Judge nonsuited the plaintiff on the ground that the Corporation could not be held liable for these expenses.

A conditional order having been obtained to set aside this nonsuit—

Mr. *Brewster*, Q. C., with whom was Mr. *Napier*, now moved to make absolute this conditional order.

This was an action brought by the plaintiff against the Corporation of Dublin, for the printing of the lists named in the 41st and 42nd sections of the 3 & 4 Vic. c. 108 (the Corporation Act). Archer and Dickinson, who were the Town-clerks under the old Corporation, gave directions for the printing of those lists; and the 56th section of the Act provides "That the Council of every borough named in the said schedule shall take an account of the reasonable expenses incurred in carrying into effect the several provisions of this Act, so far as relates to the said lists, and shall order the Treasurer of such borough to pay the same out of the borough fund of said borough:" and it was contended at the trial that Archer and Dickinson had not power to bind the Corporation. The first question is, can a Corporation be bound by a contract entered into not under seal? This, however, was a contract executed; and although the older cases establish that the acts of a Corporation must be under seal, yet the law in that respect has been modified. The objection here is a technical one, for it is admitted that the plaintiff is entitled to recover from some one; yet it is said, as the Corporation

could not promise, an action of *assumpsit* will not lie: *De Grave v. The Corporation of Monmouth* (a); in that case the Corporation were held liable in an action of debt for goods supplied to them by the order of the Mayor. The persons who are directed to get the work done are the Town-clerks, and they gave the orders for that work on behalf of the Corporation: *Dunstan v. The Imperial Gas Company* (b). Then as to the action of *assumpsit* being maintainable against a Corporation—*Beverley v. Lincoln Gas Company* (c); in that case it was held that a Corporation was liable, and that the contract may be implied or express, as in cases of *assumpsit* against an individual: *The Mayor of Ludlow v. Charlton* (d). So a Corporation will be held liable in an action of trespass for an act done by their agent: *Maund v. The Monmouth Canal Company* (e). Suppose that the old Corporation were in existence, and that they had got the benefit of this work, could they say they would not pay? Now the new Corporation is precisely in the place of the old, and subject to all its debts and liabilities, for it is expressly provided to be a continuing Corporation. The 131st section of the Act charges all these expenses on the borough fund, and makes this in fact a judgment against the property of the Corporation. The 56th section does not affect the creditor; it is merely a direction to the Corporation to do this as a duty they were bound to do. The true meaning of the contract was, that although the agreement was made with the Town-clerks, yet the plaintiff was to look to the Corporation for payment.

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Mr. Pigot, Q. C., with whom was Mr. Fitzgibbon, Q. C., *contra*.—If this were a contract by the Town-clerks that the printer should be paid by the new Corporation when the changes took place, then there would be a cause of nonsuit upon two grounds; the plaintiff could not sustain his action upon the general count for work and labour, because it would then be a special agreement; and further, it would be an executory, and not an executed, contract. I do not mean to contend that upon an executed consideration the action might be maintained; but here the evidence is that the contract was executory. The contract must be considered at the time it was made. If the action would lie at all, it could only be on the special agreement. If there was an executed consideration it was before the new Corporation had come into existence; and the question is not to be determined by arrangement between the parties but by statute: *Jones v. The Mayor of Caermarthen* (f). That was an action brought by a Town-clerk against a Corporation for duties done under the English Municipal Act; and Lord Abinger, in giving judgment in that

(a) 4 C. & P. 111.

(b) 3 B. & Ad. 125

(c) 6 Ad. & El. 829; S. C. 2, N. & P. 283.

(d) 9 C. & P. 242.

(e) 1 Car. & Mar. 606; S. C. 2 Dowl. N. C. 113.

(f) 8 M. & W. 605.

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case, says:—"His remedy, if any, is founded upon the clauses of that Act, and not upon any contract. His demand is to be paid for, if at all, out of a particular fund, negating thereby the idea that the Corporation are to pay as contractors. The Act directs him to do them, and does not direct that he shall be paid, except for his expenses, and that out of the borough fund: he is not, therefore, entitled to call upon the Corporation by way of contract." Suppose there was a liability, from the existence of a borough fund, they should have shown that such a fund existed, which was not done.

Mr. *Fitzgibbon*, Q. C., on the same side, was not called on by the Court.

Mr. *Napier* in reply.—The plaintiff was told that he was to be paid under the provisions of the Municipal Act, and that excludes all consideration of his having given credit to the Town-clerks. This is not an implied contract, but an express adoption of a previous contract, for the bills in question were actually referred to the law committee of the Corporation after the new Corporation came into existence. By the 133rd section, Corporations are empowered to raise a rate for these expenses, and they do not contest their liability, but merely the mode in which that liability is sought to be enforced. The case of *Jones v. The Mayor of Caermarthen* was an action by the Town-clerk, there being no arrangement whatever with the Corporation; it was a public duty cast upon him, and he could not charge the Corporation with it. The 56th section does not govern this case; if it did, the Corporation had the means of ascertaining the sum they should pay; it is not the case of an arbitration, for here the whole is left in the hands of the Corporation themselves. The contract here is not made on the credit of the Town-clerks; and if the Corporation are not liable, why should they be allowed to charge the rate-payers?

PENNEFATHER, C. J.

The Court is of opinion that the Judge was right in nonsuiting the plaintiff. As to the hardship of the case, we can do nothing with it, we are bound by the law. In 1840 the old Corporation was dissolved, and a new Corporation formed; that was either a substituted Corporation, or a continuation of the former existing Corporation. New regulations for the adjustment and management of the Corporation were adopted, and it was a very troublesome matter to carry these into effect; a great deal of expense and trouble was necessarily incurred, and amid other things to be done, was the printing of the lists and notices. All the debts of the old Corporation were to be assumed by the new Corporation; and the first provision was for liquidating the debts of the old Corporation.

Next after that, by the 131st section it was provided that the borough fund, which was composed of the property of the old Corporation, after discharging the debts was to be vested for certain purposes enumerated therein, and in a certain order. Now, I should say, in the absence of a specific contract to the contrary, the whole of the Corporation property is made liable in express terms to the particular expenses to be incurred in carrying out the Act. It is conceded that nothing can be made liable to make good the demand of the plaintiff except the property of the Corporation. If the plaintiff were allowed to proceed with the present action, the effect would be to give him the benefit of a judgment against the whole property of the Corporation. What would be the necessary consequence of that? Why, the arrangement of the 131st section would be interfered with, and it would give the plaintiff a preference over all other demands, which, by the 131st section were intended to have priority over him. Now, I think we ought to be careful before we give a construction of that effect against the arrangement of the Act. It was not intended to leave the party without a remedy or means of enforcing his right in the order the Act required; therefore, by the 56th section a mode is pointed out by which rights are to be enforced. That section points out the proper officer, who is the person to carry into execution the provisions of the statute with regard to those lists and other expenses. It is said, that this is not like the case of arbitrators; perhaps it is not, but it is a statutable mode which the Act of Parliament has pointed out, and the means to carry it into effect. It is like the case of officers who have been superseded by the existing Corporation, but who are entitled to compensation; and the way to obtain that is, by applying to the Court of Queen's Bench. It appears, therefore, that the Legislature, in providing for the substitution of a new Corporation instead of an old one, intended that a mode should be pursued by persons in a certain way for carrying these provisions into execution. The Act was passed before the plaintiff did the work, and he was aware how the Act provided for the payment of his charge, and must have contemplated that mode of payment which the Legislature intended. I say, therefore, under these two sections, *prima facie* there is a course which the party making a claim against the Corporation ought to pursue; and not having done so, he is not entitled to sue the Corporation in *indebitatus assumpsit*, and thereby to entitle himself to a judgment, which would so far frustrate the provisions of the statute with regard to the new arrangement for the application of the debts. But then it is said that this is a particular contract entered into by the Town-clerks acting on behalf of the Corporation; and that by reason of that special contract they were bound to have paid the amount of all the expenses of the plaintiff; and that they have thereby incurred a particular liability. A case has been cited to show that a Corporation may be

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made liable in *indebitatus assumpsit* for work and labour, or on a contract, although not under seal; but there was this material difference in that case from the present;—there was no statutable provision by which the Legislature pointed out the mode by which the Corporation was to be bound. I believe this is the general opinion of the Court, that there was no sufficient evidence of any independent contract having been entered into by the Corporation. The Corporation did not enter into it in writing, much less by an instrument under seal; all that took place was by parol between Archer and Dickinson and the plaintiff. I therefore concur in thinking that the Judge was right in nonsuiting the plaintiff.

BURTON, J.

I concur in opinion with my Lord Chief Justice. The decisions referred to as to the liabilities of Corporations, where there has been no deed under seal, have not established that in all cases where work is done, of which the Corporation have had the benefit, they stand in the position of an individual; with respect to whom, when the work is done, the law implies a promise to pay for it. That can only be done by the Legislature, and therefore, as this case does not come within those decisions, we are to see whether it comes within the principle of those cases. This case is mainly distinguishable from the others in this instance, that there was a Corporation in existence made the subject of express legislative enactment. It was not dissolved, but many new provisions were introduced, and the Act has taken into consideration the mode in which those provisions were to be carried into effect. By the 56th section, in connection with which the 131st section may be also taken into consideration there is a special provision meeting this very case, and the expenses are provided for in a certain way. Now, what has the plaintiff done to bring himself within those provisions? He has entered into an agreement to do what the Act has specified to be done. The Town-clerks told him they were not liable; and he says who is to pay? they say, the Act provides for that, and you are to resort to it, and you will have the benefit of it, and with that knowledge he enters into the agreement.

I cannot, therefore, say that this was such a contract with the Corporation, as would render them liable to this action.

CRAMPTON, J.

I entirely agree with my Brethren. The question here is, was the nonsuit right? It is an action of the first impression. If the statuteable duty of printing those lists had been thrown on the Corporation, then it might be some ground for this action. But the Act says, the Town-clerk shall have the lists made out, and the Act provides a fund for the indemnity of the Town-clerk, and the Corporation have nothing to do with it. The Town-clerk was discharging a statuteable duty, and being

bound under the Act, he dealt with the plaintiff without any authority from the Corporation; so that directly or indirectly, the Corporation have nothing to do with these proceedings. But it is said, these lists were made for the benefit of the Corporation; that may be, but they are made, not by the order, authority or sanction of the Corporation, but by the order of the Town-clerk. The Town clerks take care to protect themselves from any personal liability, and agree that the plaintiff shall look to the future Corporation under the Municipal Act. The plaintiff claims compensation for work done as upon a general contract; but there is no evidence of any such contract; nor can such a contract be implied from the plaintiff's dealing with the Town-clerks? An action at law was not the course plaintiff should have followed; there was a specific remedy pointed out for him by the Act, which he chooses to pass by. Other claimants came before the Town Council and got their claims allowed, but the plaintiff was not satisfied with the arbitration of the Council, and he comes by way of appeal here, looking for a remedy which the law does not allow. The former Corporation were proprietors of the Corporate property, the present Corporation are only trustees.

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PERRIN, J.

Our decision does not contravene any case cited. We cannot imply a general contract for work and labour. I concur, therefore, in the judgment of the Court.

Cause allowed with costs.

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Lessee of FRANCIS WHITE v. ROBERT WHITE.

June 10.

A. being in arrear with his landlord B., who had distrained his goods for such arrears; by a deed executed between them, it was witnessed, that in consideration of B. releasing and discharging A. from the payment of such arrears, and in consideration of five shillings, A. assigned and surrendered to B. the said premises for the remainder of the term unexpired; and also the goods and chattels so distrained, to hold the same as his own proper goods and chattels forever; *Held*, in an ejectment on the title, that such deed only required a surrender stamp, and that an *ad valorem* duty on the sale of the goods was not necessary to render it admissible evidence in that particular action.

EJECTMENT on the title tried before Pennefather, B., at the Cavan Summer Assizes of 1843. In support of his title the lessor of the plaintiff offered in evidence a deed bearing date the 26th of October 1842, made between Robert White of the one part and Francis White of the other part, which, after reciting that by lease of the 17th of July 1840, Francis White had demised certain premises to Robert White for a term of eighteen years, and that Robert White being indebted to Francis White in £920 for two years' rent and arrears, he (Francis) had distrained the goods, stock, machinery and utensils on said lands, amounting in value to £500, for non-payment thereof, and that Robert being unable to discharge those arrears, proposed in consideration of Francis foregoing and releasing him from the said balance and arrears of rent, and for the considerations thereafter mentioned, to surrender to Francis the said recited lease of the 17th of July 1840, together with the lands and premises thereby demised, together with all the stock, implements, machinery, utensils and goods of every description so under seizure, and in or upon or belonging to said premises so distrained, *witnessed*, that in consideration of Francis White releasing and discharging Robert White from the payment of the said sum of £920, being the amount of the balance of the arrears of rent so due by Robert to Francis, and in consideration of five shillings, Robert assigned and surrendered to Francis the said premises, to hold for the remainder of the term unexpired; and also the goods and chattels so distrained, to hold the same as his own proper goods and chattels for ever.

This deed bore a thirty-five shilling stamp, and also an additional one of twenty-five shillings for an extra number of words.

Counsel for the defendant objected to the reception of this deed in evidence, as being insufficiently stamped, and contended that it should have contained a further stamp to cover the assignment of the chattels. The learned Judge, however, admitted the evidence, and directed the Jury to find for the plaintiff.

A conditional order having been obtained to set aside this verdict and to enter a nonsuit—

Mr. John Brooke, Q. C., with whom was Mr. Sproule, showed cause.

Assuming this stamp to be necessary; if the deed were bad as to the chattels, that would not vitiate the surrender of the land; a deed may be well

stamped as to part, and bad as to the remainder : *Rex v. Reeks* (a) ; *Powell v. Edmunds* (b) ; *Grey v. Smith* (c) ; *Evans v. Pratt* (d) ; in that case it was held, that where a paper was produced bearing a stamp, which had been affixed to it for the purposes of the action, that the circumstance of the same paper having upon it another agreement, which had previously been carried into effect, and to which the stamp was never intended to apply, did not render it inadmissible. Here the action has nothing to do with the sale of the goods, we are merely proceeding on the surrender ; and the deed is properly stamped for a surrender of the lands, thirty-five shillings being the necessary amount under the Stamp Act, and twenty-five shillings for additional words.

This however, does not amount to such a sale of goods, under the statute, as to make the deed liable to a stamp. The 55 G. 3, c. 184, *Eng.*, which has been embodied into the late statute of 5 & 6 Vic. c. 82, and under which this case comes, in the schedule p. 1, tit. *Conveyance* uses the words "upon the sale of any lands tenements or other property;" here there was no regular sale; the plaintiff was landlord, and the goods at the time were not the property of the tenant, but of the landlord; they were *in gremio legis*; there was no money paid, and to bring it within the meaning of the Act it must be a money sale : *Warren v. Howe* (e) ; *Belcher v. Sikes* (f) ; *Denn d. Manifold v. Diamond* (g) ; *Blandy v. Herbert* (h) ; *Massey v. Nanney* (i). The deed was for a surrender of the lands, and was merely offered in evidence to prove that surrender : *Doe d. Copley v. Day* (k) ; *Perry v. Bouchier* (l).

Mr. Major, Q. C., and Mr. Sheil, Q. C., *contra*.—If such a deed as the present can be given in evidence numerous frauds will follow. This is a deed of surrender, and operates also as an assignment of chattels; it admits that the property was vested in the defendant, so that puts an end to the argument of its being *in gremio legis*. It is contended on the other side, that because the expression "sale" is used in the Act of Parliament, and here because no money passed, the present case is not within the Act. But the deed is a surrender of a lease, and it is also a conveyance of certain property, and therefore requires two stamps : *Corder v. Drakeford* (m) ; *Clayton v. Burtenshaw* (n) ; *Shipton v.*

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(a) 2 Ld. Raym. 1445.

(c) 1 Camp. 387.

(e) 2 B. & C. 281.

(g) 4 B. & C. 243.

(i) 4 Scott, 258.

(l) 4 Camp. 80.

(b) 12 East, 6.

(d) 4 Scott, N. R. 378.

(f) 6 B. & C. 234.

(A) 9 B. & C. 396.

(k) 13 East, 241.

(m) 3 Taunt. 381.

(n) 5 B. & C. 41.

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Thornton (a).—[PERRIN, J. Here the goods might pass without the deed at all; but if recited by the deed I apprehend the stamp is essential:—*Lessee Boothe v. McGowan (b)*; *Lessee Murphy v. Connolly and others (c)*. If this were an action for fixtures the deed would require a stamp for that purpose; a mere agreement for a sale of goods is exempt from stamp duty; but if the agreement be under seal, it must have a stamp: *Wick v. Hodgson (d)*.

Mr. *Sproule* in reply.—The 56 G. 3, c. 56, under title “conveyance,” had a provision that where two matters were conveyed by one instrument, they required two stamps, but that requisite is not in the recent Stamp Act, 5 & 6 Vic. c. 82. No fraud can be intended here; for this stamp could never be used as evidence of a conveyance of goods, because it is too small for that purpose. Whether the goods passed or not under this deed, there was a proper surrender stamp: *Doe d. Hartwright v. Fereday (e)*; it was there held that a deed conveying certain lands in trust, and also containing a declaration of a similar trust with respect to Government stock, was not to be considered two deeds under the Stamp Act, and that one stamp was sufficient.

PENNEFATHER, C. J.

The subject matter upon which the present action is grounded is a surrender. The defendant by the same deed made a surrender in point of law of the interest in the land, and he also by the same deed made a sale of goods and chattels under distress. Taking the case as strongly as possible against the lessor of the plaintiff, upon that sale an *ad valorem* duty was payable, and a duty was also payable on the surrender, and the deed bore a stamp sufficient to cover the surrender, but not sufficient to cover the *ad valorem* duty on the sale of the goods.

The case of the defendant has no merits, for the present action is an ejectment on the title brought by the plaintiff against the defendant, to make him execute so much of this deed so as to effectuate the surrender, and for that a sufficient duty has been paid; and although there is contained in the same deed, connected more or less with the same transaction, a sale of goods, yet it is not necessary, for the purposes of this action, to show that the *ad valorem* duty on the sale of those goods has been paid; the case in 4 *Perry & Davison* is quite an authority in point with the present, and Lord Denman there says, “We find no provision in the Act except “in cases of conveyance by way of sale, that when a deed operates on

(a) 9 Ad. & El. 314.

(b) 4 Ir. Law Rep. 188; S. C., L. & T. 273.

(c) 6 Ir. Law Rep. 116.

(d) 12 Moo. 213.

(e) 4 P. & Dav. 287; S. C. 12, A. & E. 23.

"several subject matters in several ways, it shall have several stamps, and "in the absence of any such provision, we think that one stamp is sufficient." If, therefore, there was a sufficient stamp for the purposes for which the deed was produced, it is enough. The case in 13 *East*, I think also bears upon the point, but not so strongly as the case in *Perry and Davison*. For these reasons, I am of opinion, that the cause shown should be allowed.

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BURTON, J.

I have felt some doubt in this case, and my mind is not altogether free from it; but looking at the case in a general point of view, I think the decision of my Lord Chief Justice the most reasonable course.

The plaintiff takes a surrender of the lands, and as a consideration for that, he takes the goods which he had distrained, which comes nearly to a sale of them although not in terms so expressed, and he releases the defendant from all further demands. As to the surrender itself, for that there is a proper stamp; but then it is said, that in addition to this, there is what amounts to a sale of goods to a landlord by his tenant, and that being a sale of goods there ought to be a stamp for that; it is in effect said, that there is in one deed what is subject to two stamps, and that one stamp is not sufficient, because with respect to the sale, if that be a sale, it would not be good without a stamp. If there are two deeds they are for two different purposes; one for the sale of goods, the other for the surrender of lands: therefore, for this reason each ought to have a stamp, when that particular part of the deed is sued on, otherwise not. When the surrender is sought to be carried into effect, there is no reason why that part of the deed should be taken into consideration which includes the sale, if it do amount to a sale, of the goods; it therefore appears to me, the most reasonable decision which has been suggested by my Lord Chief Justice, that one stamp is sufficient.

CRAMPTON, J.

I have had a great deal of difficulty in coming to a conclusion in this case. If I were at liberty to consider the doctrine laid down in 4 *Perry and Davison*, 287, as applicable to this case, it would rule the question, but I have some difficulty about that. There is something very peculiar in the present case. May not this instrument be taken as a surrender of the lands with some property then on the premises,—the consideration being a release of the rent due? It is all one transaction; that makes the difficulty of the case; but I am disposed to think there is a good deal in the distinction suggested between a sale within the statute, and such a transaction as the present. This is not a bargain and sale; it is not a bargain by one person and a sale by the other. It is more like the

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case of a mutual release, made to determine the relation of landlord and tenant; the landlord says, I will release the rent, and the tenant says, I will give up the land and the stock as a consideration for the release of the rent. Now, the instrument it is agreed had a sufficient stamp for the purposes of the surrender, and a surrender requires a higher stamp than a release; and feeling a difficulty about that doctrine in the case from 4 *Per. & Dav.*, I would rather rest my opinion on the peculiarity of the present transaction, as not amounting to a sale under the Stamp Act, but as a releasing of the rights of landlord and tenant.

PERRIN, J.

That is my view of the matter. This is not the case of a sale where you are to measure it by the stamp duties.

Allow cause shown with costs.

WILLIAM FARRAN, in Error,

v.

JOHN BERESFORD and CATHERINE OTTIWELL,
 Executor and Executrix of HENRY OTTIWELL, deceased.

June 11.

Executors, plaintiffs in *scire facias*, prior to the passing of 3 & 4 *Vic.*, c. 105, cannot be held liable for costs when judgment is given against them.

MR. RICHARD ARMSTRONG moved to have judgment obtained in this case by the plaintiff in error entered up against the defendant in error, with costs. The action had been originally commenced in this Court by the defendants in error, as executors of Henry Ottiwell, against the plaintiff in error on a *scire facias*, and judgment had been obtained thereon against the plaintiff in error, from which judgment a writ of error had been brought into the Exchequer Chamber, and that Court affirmed the judgment of the Court of Queen's Bench; and on this judgment a writ of error was brought to the House of Lords, when the judgment of the Court of Exchequer Chamber was reversed (a). The plaintiff in error is therefore now entitled to have judgment entered in his favour in this Court, but the officer has refused to enter the judgment with costs.

The question raised here is, can executors plaintiffs in *scire facias* be made liable for costs? The first statute that gave executors costs

(a) *Farran v. Ottiwell*, 5 Ir. Law Rep. 487.

is the 6 *Edw.* 1, but that statute only applied where damages were given, and in the action of *scire facias* no damages are given. Then came the Act 9 *W.* 3, c. 10, s. 3.—[CRAMPTON, J. Was the case of demurrer provided for by that statute?—The 4 *Geo.* 1, c. 13, provides for cases of demurrer. That 3rd section of 9 *W.* 3, c. 10, is copied from the 5th section of 8 & 9 *W.* 3, c. 11 (the analogous English Act); and it exempts executors, whether plaintiffs or defendants, from its provisions. The 5th section of the Irish Act narrows the cases to those where the executor is a defendant. In *Duarris on Statutes*, p. 702, it is said, "The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use." The Act of Parliament says, "any person or persons;" how can the Court say any person or persons except executors? *Glover v. Nagle* (a) will be relied on by the other side, but the impression of Chief Justice Doherty in that case was wrong: *Wilkinson v. Edwards* (b).

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Mr. J. Brooke, Q. C., *contra*.—This motion is confessedly for the purpose of altering what is the settled practice in this country as stated in *Glover v. Nagle*, and that it is so, is evidenced by the fact that the officer of the Court refused to enter judgment with costs. It is said, there is a difference between the Irish and English Acts. Up to the 23 *Hen.* 8, c. 15, a plaintiff executor was not liable to costs: 2 *Tidd's Prac.* 978. The Irish statute 10 *Car.* 1, is similar. The 4 *Geo.* 1, c. 13, is merely a declaratory Act to the 9 *W.* 3, c. 10. This Court cannot modify or alter the judgment of the House of Lords (c).

PENNEFATHER, C. J.

June 12.

This was a motion to extend an order of the 10th of July, by inserting the words "with costs," for the defendant. The Court are of opinion that, though the case is one of a good deal of obscurity, yet, their safest way is not to make any order on the present application. The action was on a *scire facias* issued by executors, and the question raised was as to their liability to costs. That is a question which might be raised upon the record, and this is a reason why the Court will not interfere with the established practice. We would rather not interfere on a motion in a case of doubt, but leave the party to proceed as he may be advised. There is also this difficulty; we could not accede to the present motion without overruling the decision of the Court of Common Pleas in *Glover v. Nagle*. There is, therefore, a direct decision against the motion, on argument, as well as the established practice

(a) 3 *Ir. Law Rep.* 21.

(b) 1 *Scott*, 174.

(c) *Ld. Raym.* 10.

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prevailing in this country from the 9 *W.* 3, until the passing of Pigot's Act—a universal practice of nearly 150 years. Unless the case were as plain as day, the Court would not interfere under such circumstances, when the party has an opportunity of trying the question in another way. Besides, there is no chance of the point recurring since Pigot's Act, at least it would be very rare. Though there is not an identity of expression in the English and Irish Acts on this subject, yet, there is a correspondence in principle, and the construction should be one and the same. The Court, therefore, will make no rule on the present motion.

No rule.

HUNT v. LANE.

June 11.

A declaration by the bye must be filed in Term, and a copy of it served on the opposite party in the Term in which it is filed.

A DECLARATION in chief in trespass had been filed in last Easter Term, and in the ensuing Vacation the plaintiff filed a declaration by the bye against the defendant, and served notice thereof, but did not deliver any attested copy until the following Term.

Mr. *J. F. Townsend* moved that this declaration by the bye be taken off the file for irregularity. This declaration by the bye is irregular on two grounds; first, as it was not filed in Term: *Talbot v. Smithwick* (a); and secondly, an attested copy should have been served in the Term in which it was filed: *Moore and Lowry's Rules*, 67.

Mr. *Sherlock*, contra.—According to the practice of this Court the plaintiff may, in the Vacation, file a declaration by the bye: 1 *Ferg. Prac.* 219.

Per Curiam.

The declaration is entitled as of last Term, and the copy was not served until this Term; it is therefore irregular, and must be set aside.

Let the declaration be set aside without costs.

(a) Batty, 152.

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v.

SIR EDWARD RICHARD BOROUGH.

*April 23.
May 31.
June 12.*

QUO WARRANTO.—The information, after reciting the Act 26 G. 3, c. 19, *Ir.*, whereby the Ballast Corporation of the city of Dublin was constituted, averred “that for sixty years last past there had been in the city of Dublin, to wit,” &c., “one body corporate and politic in deed, “fact and name, having perpetual succession, and called and known by “the name of the Corporation for preserving and improving the port of “Dublin; and that for and during all the time aforesaid there had been, “or ought to have been, twenty-three members of the said Corporation, “at,” &c. It then stated that “the office of one of the members of the “said Corporation was then, and for and during all the time aforesaid “had been a public office, and a place of great trust, authority and pre- “eminence within the said city, touching the rule and government of the “said port and harbour and the river of Dublin, and the improvement “and security thereof, and the regulation and good order of the shipping “therein, and resorting and trading thereto; and touching the imposing “and levying of certain rates, charges and duties upon all ships and other “vessels, and on the goods and cargoes, and on the owners and masters “thereof, coming into and trading to the said port, harbour and river, “and touching the making of bye laws, rules and orders for the purposes “aforesaid; and also touching the trial of certain offences against the “said Act, and the imposing and levying of fines and penalties there- “under, to wit, at,” &c. It then averred the exercise of the office by the defendant without any lawful appointment, authority, direction or rightful title, &c., and the defendant’s claim to use and enjoy the said office, and all the rights, &c., without any legal warrant, royal grant, &c.

By the Act 26 G. 3, c. 19 (*Ir.*), constituting the Ballast Corporation of Dublin, the Sheriffs of the city of Dublin for the time being, were appointed members of the said body. The Municipal Act (3 & 4 Vic. c. 105), though it alters the mode of appointment of the Sheriff, does not affect his right to be a member of the Ballast Board. Such right is incident to his office as Sheriff, and he holds the same position as the two Sheriffs formerly had.

To this information there were three pleas. The first, after admitting the existence of the office described in the information under the said Act, stated that it was by the said statute also enacted (a), that the Lord Mayor and Sheriffs of the city of Dublin for the time being, should be members of the said body corporate and politic, to wit, at, &c.; that by a certain Act of Parliament passed in the third and fourth years of the reign of our Lady the now Queen, entitled “An Act for the regulation of Municipal Corporations in Ire- land,” it was, amongst other things, enacted (b), “That in the year

(a) Sec. 2.

(b) Sec. 150.

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"following the year in which that Act should come into operation in the said county of the city of Dublin, and in every succeeding year, a Sheriff should be appointed by the Lord Lieutenant of Ireland in the same manner to all intents and purposes as the Sheriff of any county at large was then by law nominated and appointed, to wit, at," &c.; and the plea then further averred, "That the said last-mentioned Act did come into operation within the said county of the city of Dublin afterwards and before the filing of the said information, to wit, on the 10th day of April 1841, to wit, at," &c.: "And that afterwards, and after the year following the year in which the said last-mentioned Act came into operation in the said county of the city of Dublin, and before the filing of the said information, to wit, on the 10th of February 1842, the said defendant was by warrant under the hand of his Excellency, Thomas Philip Earl De Grey, then and there being Lord Lieutenant General and General Governor of Ireland, in due form of law nominated and appointed to be High-sheriff of the county of the city of Dublin during her Majesty's pleasure; and the said defendant was then and there required to take the custody and charge of the said county, and duly to perform the duties of Sheriff thereof during her Majesty's pleasure, to wit, at," &c.: "And that afterwards and before the filing," &c., "to wit, on the 12th day of February 1842, at," &c., "the said defendant, before the Right Hon. Maziere Brady, then and there being Chief Baron of her Majesty's Court of Exchequer in Ireland, in due form of law took and subscribed the oath by law required to be taken by the High-sheriff of the county of the city of Dublin, and then and there became and was such Sheriff of the said county of the city of Dublin, and took upon himself the duties of the said office, and used and exercised, and of right ought to use, exercise and execute the same from thence during her Majesty's pleasure, to wit, from thence hitherto; and by reason of his the said defendant so being such Sheriff as aforesaid, he the said defendant for and during all the time in the said information in that behalf mentioned, at the place aforesaid, had used and exercised, and still doth of right use," &c., "the place and office of one of the members of the said Corporation for preserving and improving the port of Dublin; and to have, use and enjoy all the rights, liberties, powers, authorities, privileges and franchises to the said place and office of one of the members of the said Corporation for preserving and improving the port of Dublin, as it was lawful for him to do; without this, that he the said defendant had, during all or any part of the time, as the said information mentioned, usurped, or doth usurp the said office, or the rights, liberties, powers, authorities, privileges and franchises thereof, or any of them, upon our said Lady the Queen, in manner and form," &c. Verification.

The second plea commenced, "And for a further plea in this behalf, "by leave of the Court here for this purpose first had and obtained, "according to the form of the statute in such case made and provided;" and having recited the Act 26 G. 3, and the constitution of the Ballast Corporation, as in first plea, then averred, "That from the passing of said "Act, until the said defendant became and was the Sheriff of the county "of the city of Dublin, in manner in this plea theretofore mentioned, "the Lord Mayor and Sheriff of the city of Dublin for the time being "were, and of right should be, members of the said body corporate and "politic, to wit, at the place aforesaid." The plea then stated the provisions in the Municipal Act, for the appointment of Sheriff, as in the first plea, and went on thus: "And it was in and by the said statute further "enacted (a), that from and after the time when the same should come "into operation in any borough in which any member of the body corporate, or any person elected from among or out of the members of "such body corporate, or any person elected by such body corporate, or "a particular or limited number, class or description of members of the "body corporate, should be when the same statute should come into "operation, trustee, solely or jointly with any other trustee, for the "execution of any Act of Parliament, or of any trust other than any act "or trust for which any other provision was thereinbefore made; or by "any statute, charter, bye-law or custom, should be when the same Act "should so come into operation, lawfully appointed to or authorised to "exercise any powers, duties or functions whatsoever, not otherwise "therein provided for, and the continuance of which were not inconsistent "with the provisions of the same Act; such acts, trusts, powers, duties "and functions, should, after the same Act should have come into "operation, be executed by the person who should thereafter correspond "in office with the person by whom the same ought to be executed, "before the said Act should have come into operation. And it was, "in and by the said Act further enacted (b), that in describing any person "or thing, any word importing the singular number should be construed "to mean also, several persons or things respectively, unless there should "be something in the subject or context repugnant to such construction; "as by the said statute, reference," &c. It then stated the coming into operation of the Municipal Act, the appointment of the defendant as Sheriff, his taking the oath of office, and proceeded, "And the said "defendant further saith, that from the time of his said nomination and "appointment as such High-sheriff, and his taking the oath as such as "aforesaid, he, the said defendant, became and was, and from thence "hitherto hath been, and still is, the person who corresponds in office "with the persons who filled the office of Sheriffs of the city of Dublin,

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(a) Sec. 117.

(b) Sec. 215.

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"before the said last-mentioned Act came into operation in the said county of the city of Dublin, and by reason thereof, for and during all the time in the said information in that behalf mentioned, he had used, &c., the place and office of one of the members of the said Corporation for preserving and improving the said port of Dublin, &c., *"without this,"* &c.

The third plea averred the same matters as the first, only in a more general form. The nomination of Sir Edward Borough, to be High-sheriff, and the oath taken by him as such were added.

To the first plea the following causes of demurrer were assigned:—
 "That the said first plea was uncertain and insensible, as it alleged that by the Act of Parliament, entitled 'An Act for the Regulation of Municipal Corporations in Ireland,' in that plea mentioned, it was amongst other things enacted, that in the year following the year in which that Act should come into operation, in the said county of the city of Dublin, and in every succeeding year, a Sheriff should be appointed by the Lord Lieutenant of Ireland, in the same manner to all intents and purposes as the Sheriff of any county at large was then by law nominated and appointed; but did not in any manner set forth or show that a Sheriff should be so appointed in the county of the city of Dublin, or in any or what particular county, or in what manner such Sheriff should be appointed; and also, that the said first plea did not truly or sufficiently set forth or recite the said enactment of the said Act of Parliament in that behalf; and that the said plea was inconsistent, and the statements therein repugnant, in alleging that the said last-mentioned Act of Parliament came into operation within the said county of the city of Dublin, on the 10th day of April, A. D. 1841, and that on the 10th day of February, A. D. 1842, the said defendant was in manner and form therein mentioned, appointed to be the High-sheriff of the county of the city of Dublin, such appointment being in said plea alleged to have been made *after* the year following the year in which the said last-mentioned Act came into operation, within the said county of the city of Dublin; and that the said plea averred the exercise of the office of one of the members of the Corporation for preserving and improving the port and harbour of Dublin; and did not set forth or show, or deduce any legal title or authority to assume, or any provision of law whereby the defendant was entitled to have, use or enjoy such place or office, or any of the rights, &c., thereto belonging; and that it did not set forth or show any statute, charter or provision of law whereby the said defendant could, of right, claim as such Sheriff of the county of the city of Dublin, to be one of the members of the said Corporation for preserving and improving, &c.; and did not set forth or show any election, nomination,

"or appointment of the said defendant to the said place and office of one of the members of the Corporation for preserving, &c. ; and that it contained matter of inducement, namely, that in and by the said first recited statute it was enacted, that the Lord Mayor and Sheriffs of the city of Dublin, for the time being, should be members of the said Corporation for preserving, &c., which said matter of inducement was impertinent and irrelevant, and was not shown to have any connection with, or in any way to explain the allegation in said plea contained, or to be in itself essential to the material issue sought to be raised by the said first plea ; and that it was argumentative and evasive, and did not contain any proper or positive averment of title, or any certain and sufficient deduction of title of the said defendant, to the said place and office ; and the material issue tendered by the said plea was not proper to be tried by a jury ; and that it was, in other respects, informal and insufficient."

Demurrer to the second plea assigning for cause :—" That the same purported to be pleaded by leave of the Court, according to the form of the statute, whereas no authority was given by any statute to enable the defendant to plead the said second plea, or to empower the Court to give such leave as aforesaid."

The second ground of demurrer was for repugnancy, as was specified to first plea, and the third cause of demurrer was thus assigned :—" That the said second plea was defective and informal, in not setting forth, or showing what particular body corporate, or description of body corporate was in the said second plea referred to or intended as the body corporate in which any members, or any person elected from among or out of the members of such body corporate, or any person elected by such body corporate, or a particular or limited number, class, or description of members of the body corporate, should be such trustee or trustees as mentioned in the said second plea ; or what body corporate was meant to be described by the said second plea ; and that it was insensible and repugnant if it was thereby intended by the words body corporate, in that behalf mentioned, to refer to or describe the body corporate for preserving, &c., and which said body corporate was the only body corporate in said second plea mentioned ; and that it was further insufficient and informal, in not averring or setting forth that at the time when the said last-mentioned Act came into operation, as aforesaid, the High-sheriffs of the city of Dublin were members, or that either of them was a member of any body corporate within the meaning of the said Act, in said second plea set forth ; and that the said second plea did not, in other respects, show or state the application of the said enactment to the office of High-sheriff of the city of Dublin ; and did not show in what manner, or by what title or authority, the said defendant became, and was, and still is, as alleged in the said second

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T. T. 1844. *Queen's Bench.* "plea, the person who corresponds in office with the persons who filled
 THE QUEEN "the office of Sheriffs of the county of the city of Dublin, before the
 v. "last-mentioned Act came into operation in the county of the city of
 BOROUGH. "Dublin." Further causes of demurrer, that the defendant did not show
 title, and that the second plea tendered issues of law, &c.

Demurrer to third plea:—"That it was irregular, there being no
 "authority in law for double pleading in such cases; that it did not
 "contain any sufficient statement of title, &c., by which defendant claimed
 "the office in question; that it was argumentative, and tendered issues of
 "law; that it did not confess and avoid, or sufficiently traverse or deny
 "the matters stated in the informations, save by argument and inference,
 "and by way of inducement and recital, and not by positive averment;
 "and that the Act of Parliament therein recited, entitled, 'An Act for
 "the Regulating of Municipal Corporations in Ireland,' was erroneously
 "and informally described as having been passed in the third and fourth
 "years of our Lady the Queen; and that the said plea was in other
 "respects uncertain, informal and insufficient." Joinder in demurrer.

Mr. Close, with whom was the *Solicitor General*, in support of the demurrers.

The objection to the first plea is that, purporting to recite the 50th section of the 3 & 4 Vic. c. 108, it does not show in what place the Sheriff should be appointed, nor for what place or county the appointment should be made.—[PENNEFATHER, C. J. That is a defect in the pleadings.—CRAMPTON, J. Your objection is to a defect in the recital of the Act of Parliament; was it necessary for the pleader to recite the statute?—It might not, except to explain his pleading; but having thought fit to recite it, he must do so correctly: *Cro. Eliz.* 236. The appointment pleaded here might be for any other place.

The second objection applies to both the first and third pleas. In them it is stated that the Municipal Act passed in the third and fourth years of the reign of her Majesty; when it should have been averred, that it passed on a certain day, or in a certain session of Parliament; *Res. v. Biers* (a); *Gibbs v. Pike* (b); 2 *Hawk. Pleas of the Crown*, c. 25, s. 104: and as to the misrecital of a public statute; *The King and Barnes v. Hill and Windsor* (c); *Earl of Shaftesbury v. Lord Digby* (d); *Boyce v. Whittaker* (e). No judgment can be given in such a case, even on consent of both parties: *Love v. Wotton* (f).

The third objection applies to the first and second pleas. The year of

(a) 1 Ad. & El. 327.

(b) 8 Mees. & Wels. 223; S. C. 9 Dow. P. C. 751.

(c) Cro. Ch. 232.

(d) 2 Mod. 99.

(e) Doug. 97.

(f) Cro. Eliz. 245.

the defendant's appointment is wrongly stated; it is averred, that the Municipal Act came into operation on the 10th of April 1841, and that afterwards, and after the year following the year the Act came into operation, in said county of the city of Dublin, and before the filing of said information, to wit, 10th February 1842, the said defendant was appointed High-sheriff, &c. This is clearly inconsistent and repugnant.

The fourth objection applies to the three pleas. The appointment of the defendant as Sheriff by the Lord Lieutenant during pleasure is averred; and that by reason of being such Sheriff, the defendant has used, &c., the office of one of the members of the said Corporation, &c., and that from the time of such appointment, &c., he became, and was, &c., and is the person who corresponds in office with the persons who filled the office of Sheriffs of the county of the city, &c., before the last mentioned Act came into operation in the said county of the city, &c., and by reason thereof, &c. The same statement is in the third plea as in the first plea. There is no sufficient title to the office deduced or shown; nor is there any provision of law sufficiently set forth in support of the title; nor does it appear that by the defendant's appointment as Sheriff, he is necessarily a member of the Ballast Board in reference to the enactment of 26 G. 3, c. 19.

The fifth objection is as to the second plea. It is not there shown, that the Corporation referred to is such a body corporate as is contemplated by the 117th section of the Municipal Act, nor that it is a body corporate of the city of Dublin, or county of the city of Dublin. There is in the plea no body corporate referred to, except the Corporation for preserving the port and harbour of Dublin; our objection in fact is, that the Sheriffs of the city of Dublin are not shown to belong to the classes described in the plea; that is, that the person selected out of the body corporate, or the person whose office the Sheriff represents, was within the terms of any one of the three classes described in that section.—[PERRIN, J. Is it not shown that they were members of the Corporation?—The defendant should have connected his office with these persons, he has left it as a matter of inference. The style of the old Municipal Corporation was, "The Right Honorable the Lord Mayor, Sheriffs and Commons of the Citizens of Dublin; it is now different as it does not now include the Sheriffs.

With respect to the title of the defendant to the office of member of the Ballast Board, reference must be had to the early Acts constituting and governing that body. By 6 Anne, c. 20, s. 1. the Lord Mayor, Sheriffs, Commons and Citizens of Dublin were authorised to erect an office to be called the Ballast Office, and to be always under their inspection. The 6 G. 1, c. 15, ss. 6 & 7, gave further powers; the 10 G. 1, c. 3, ss. 23, 24, 25 and 26, followed,

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and that statute was perpetuated by 23 *G.* 2, c. 8. Then came the 3 *G.* 3, c. 15; and by the 13th section of that Act the Common Council and Guild of Merchants were empowered to elect, every three years, a certain number of persons to be a committee for the nomination of pilots, to be appointed by the Lord Mayor, and to regulate their salaries. There were other provisional enactments in the 19 & 20 *G.* 3, c. 7; and then came the 26 *G.* 3, c. 19; under which the Ballast Board is constituted. The first section repeals all former Acts; the second section appoints the Lord Mayor and Sheriffs of the city of Dublin for the time being, together with seventeen other persons named, and three Aldermen of the city, a body corporate for carrying into execution the purposes of the Act, by the name of "the Corporation for preserving and improving the port of Dublin." The 11th section provides for cases of death, resignation, or refusal of any of the persons named to act; and by it, the remaining members are directed to elect other fit persons, save in cases of such vacancy by the death, &c., of any of the Aldermen named, when the Lord Mayor and Board of Aldermen were to elect one of the Aldermen to fill the vacancy, &c., so as that at all times thereafter there might be three Aldermen of the city in said Corporation for preserving the port and harbour. Other powers and regulations are given and made by subsequent sections. As to the correspondence in office between the present Sheriff and the Sheriffs under the old laws, we refer to the 33 *G.* 2, c. 16, *Ir.*, (Lucas's Act), which introduces changes into the constitution of the Corporation of Dublin; and by the 9th section of that Act, the Commons of the Common Council, were at the usual time of electing Sheriffs to nominate eight freemen resident within the city or liberties, worth £2000 over just debts, as fit persons to serve the office of Sheriffs. The Lord Mayor and Aldermen are then to elect two persons out of the eight so returned to serve the said office, and they were to be the Sheriffs for the ensuing year. Then it provides for vacancies. And the 10th section provides in case of vacancies in the Aldermen, that the Lord Mayor and Aldermen were to nominate four persons from among the Sheriffs' Peers of the city, and return them to the Commons, who are to elect one to be Alderman. The 11th section provides for the election of Lord Mayor; and the 15th section gives the jurisdiction of the Court of Conscience to the Lord Mayor, Aldermen, Sheriffs and Sheriffs' Peers. Under the New Rules, *Car.* 2, 1672, the election of Sheriffs is vested in the Lord Mayor and Aldermen; they were thereby required to account to the auditors of the city within six months after leaving office; and by the fourth of those rules, the Sheriffs being heretofore set apart by the Commons for a year, and being in office as Sheriffs, they were presidents of the Corporation of the city of Dublin, and were entitled to preside as Judges of the Court of Conscience. The appointment of Sheriffs of Dublin, now under

the 150th section of the Municipal Act, is the same as the Sheriffs of other counties and cities; that appointment is made under 5 & 6 W. 4, c. 55. By the 2nd section, the appointment is to be made by warrant under the signature of the Lord Lieutenant, according to the form in the schedule; the warrant is to be made out by the chief or Under Secretary, and by him transmitted to the person appointed; then, by section 4, the Sheriff is within one month to appoint an Under-Sheriff by writing under his hand, and transmit a duplicate of that appointment to the Exchequer. That appointment of the Sheriff is during the pleasure of the Crown, and is made in January or February; whereas, under the old law, the appointment was made on the 29th of September in each year. The differences therefore in the appointment under the old law and the new consists in, first, the time of the election; second, the qualification requisite; third, the mode of appointment; fourth, the duration of the office; fifth, its dependence on the executive; sixth, the duties as to Sub-sheriff. Then the Sheriff appointed by the Lord Lieutenant need not be a member of the Corporation at all; and for several other of the functions prescribed by the old Act, the present Sheriff is not competent. Looking to the terms of the 117th section of the Municipal Act, the correspondence of the office must be a substantial one.—[PERRIN, J. You read the statute to mean as corresponding in corporate office.]—That he shall be a member of the Corporation to entitle him to sit at the Ballast Board.—[CRAMPTON, J. Whether the office is to be deemed a corporate office is the question.]—A Sheriff holding office at the pleasure of the Crown, does not correspond with the Sheriff of the former Corporation, and the Court will not repeal an Act of Parliament by implication.

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Mr. Napier, with whom was Mr. Webber, contra.—The question is not one of policy or convenience, but of construction; not a question on the 117th section of the Municipal Act, but on the 26 G. 3, c. 19; and we contend, that inasmuch as the defendant fills the office of Sheriff of the county of the city of Dublin, he comes within the terms of 26 G. 3, c. 19.—[CRAMPTON, J. Is that independent of the Municipal Act?]
 —Yes, for the 117th section before referred to, does not apply here. It does not signify by whom the Sheriff was appointed; it was in respect of the office itself that he was constituted a member of the Ballast Board, and it had no reference to the appointment. The earlier statutes of 6 Anne, c. 20, and 33 G. 2, c. 16, have been adverted to. Under that last Act, the Mayor and Sheriffs were not to act until approved of by the Lord Lieutenant and Council, and this by reason of their public official duties. What is the meaning of the office of Sheriff? His duties or his office did not vary according to his appointment; it was a public office: *Co. Lit.* 168; *Terms de la Ley*, 597;

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Rex v. Mein (a). The Corporation itself derives its title from the Crown; and it is in regard to the duty of Sheriff that he was made an *ex-officio* member of the Ballast Board. The 26 G. 3, c. 19, created a special and distinct Corporation called the "Ballast Board;" it repealed the 6 Anne, and 3 G. 3; and under it, the Lord Mayor and Sheriffs are for the time being *ex-officio* members of that board. By the 3rd section, all the property and books were transferred to the new Corporation; the 11th section empowered the Lord Mayor and board to elect in cases of vacancy among the Aldermen; the 13th section required the approval of the Lord Lieutenant and Council; and by the 15th section non-attendance was made equivalent to resignation: the object was to have an efficient Corporation. By the 33 G. 2, c. 16, s. 18, the Mayor and Sheriffs were made Justices of the city, and it is in their capacity as public officers that they were made members of the Ballast Board, as conservators of the county, appointed under the direction of the Crown, and subject to the approval of the Lord Lieutenant. The office of Sheriff was then filled by two persons, but they are but one officer: *Rex v. Wilkes* (b); *Bac. Ab. Sheriff, K.* The right, therefore, to sit at the Ballast Board being an incident of their office, devolves on the Sheriff now appointed by the Crown; and the words "Sheriffs for the time being" are satisfied by only one person holding the office: *Attorney-General v. Lockwood* (c).

The Sheriff must have a qualification in the county: *Joy on Challenge*. The corporate rights of the Sheriff are now at an end by the 3 & 4 Vic. c. 108, s. 1; and the Sheriff having ceased to be a part of the Corporation, there is no one in the Corporation corresponding with him in office. The 12th section of 3 & 4 Vic. c. 108, designates the Corporation, and in that title the Sheriff is omitted; his corporate rights have therefore ended, but his official duties, as conservator of the county, remain, and as such he continues a member of the Ballast Board. The 22nd section extends the Sheriff's power within all new boundaries; and the 117th section is the one which raises the question for the plaintiff; its meaning is simply, that the new Corporation being on a different footing from the old, there might be persons in the new Corporation not actually corresponding with the old, yet to a certain extent they might represent them in particular offices: *Belfast Corporation v. Commissioners of Police* (d).

It is however said, that there is no person now corresponding in office with the Sheriff. How can the Corporation appoint if there be no office? and if they can appoint under the 117th section, and put two persons on the Ballast Board, the veto of the Crown is taken away. The

(a) 3 T. R. 598.

(b) 4 Burr. 2560.

(c) 9 Mees. & Wels. 399.

(d) Not reported.

latter part of the 119th section shows that the case of Sheriffs was not within the 117th; and also the 150th and 151st sections. The office of Sheriff continues, because it is not a corporate office, but a public office, and one under the appointment of the Crown, who has the nomination thereto.

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As to the objections to the pleadings:—A public act, if it be in a plea at all, is to be stated simply as a fact and not as an inference at law: *Wolsey v. Sheppard* (a). There the Court held, the mistaking the day of the Act is not prejudicial by way of bar; but by way of count it must be laid truly: *Chance v. Adams* (b). The title of an Act is no part of the Act; it is but surplusage, and will not vitiate a plea. All about the Act may be rejected here, and enough remains for our case: *Ratcliffe's case* (c); *Lewis v. Lyster* (d). As to the alleged repugnancy in the averment of the Act coming into operation in the "year following the year," &c., it is settled, that the time is immaterial under a *videlicet*.

The *Solicitor-General*, in reply.—Has the defendant shown in the *quo warranto* proceedings a title to the office at the Ballast Board? We allege he has shown no such title. The conservation of the port and harbour of Dublin belonged to the old Corporation of Dublin, as representing the city of Dublin, and as trustees of the city. The office of membership of the Ballast Corporation was held from 6 *Annæ* to 26 *G. 3*, as a corporate trust; then the control of the Ballast Corporation was changed, and other private persons were appointed with the old members to regulate it; but the latter Act did not disconnect the trusteeship of the Ballast Board from the new Corporation. The 11th and following sections show that it was intended to preserve a continued corporate succession, and that the association of Aldermen and Sheriffs with private persons, was to preserve the connection between the Corporation and the Ballast Board; and the Sheriffs were members as corporate officers. The Legislature then, contemplating the inexpediency of the Corporation electing Sheriffs to execute writs, placed the Sheriffs of Dublin on the same footing as county Sheriffs; and the 117th section of the Municipal Act does not deprive any corporator of any right he had in the execution of any trust, save so far as was indispensable for the purposes of that Act. The question really is, is the Sheriff now appointed by the Crown the Sheriff contemplated by the 26 *G. 3*?—[CRAMPTON, J. Suppose the Municipal Act had said the Lord Mayor should be nominated by the Lord Lieutenant, instead of by the Corporation, would he cease to be Lord Mayor under the old Act?—We say

(a) Brownl. 196.

(b) 1 Ld. Raym. 77.

(c) 2 Lew. C. C. 57.

(d) 2 C. M. & R. 704.

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the defendant does not represent the old Sheriff; the Corporation are not to be deprived of their right to represent the trusteeship of the Ballast Board; they were to have eleven votes at that board; and that number is now reduced by one, in consequence of the new appointment of Sheriff, if the present defendant represent that office.—[CAMP-
 TON, J. The Municipal Act, in certain cases, diminishes the number of trustees, as decided by us in the Belfast case.]—It was in their corporate capacity the Sheriffs were members of the Ballast Board. Now, the Sheriff is but the Queen's officer, and being such, the office is different from the one contemplated by the 26 G. 3.

Cur. ad. vult.

June 12.

PENNEFATHER, C. J.

This was an information in the nature of a *quo warranto* against the defendant, for an alleged usurpation of the office of a member of the Ballast Board, under 26 G. 3, c. 19; to which the defendant put in three pleas; it is sufficient, however, to consider the first only, as there are objections taken to it on the merits and on point of form, from which the other two pleas are exempt. The first plea was—[reads plea.]—The days are all laid under a *videlicet*, and there is nothing to render any of them material. The second plea differs in some measure from the former, but not materially—[states the second plea]—and the third plea is more general than the first plea. All of these have been demurred to, and various causes of demurrer assigned, three of which causes go to the merits, and the rest to matter of form. Now, in my view of these pleadings, the merits and the right to the office appear by the pleadings to be vested in the defendant, at least it was so at the time of filing the *quo warranto*. The question generally and substantially is this:—For a long time there has been a Ballast Office in the city of Dublin, anciently existing and exercising privileges. Originally, according to the arguments addressed to us, that office was under the control of the Mayor, Sheriffs, Commons and Citizens of the old Corporation, by an Act of Parliament passed in the reign of Queen Anne. That Act conferred powers on the Ballast Office which have been regulated by different Acts passed since then. I need not enter into a statement of these; they were all repealed, and the Ballast Corporation put on a new footing by the 26 G. 3, c. 19; called “An Act for promoting the trade of Dublin, and rendering the port and harbour more commodious:” whereby a new system was established. By that Act the Lord Mayor and Sheriffs for the time being, and other persons of consideration therein named, and three members of the Board of Aldermen also named, were made members of the Ballast Corporation; all sums of money were vested in that Corporation so appointed; oaths of office were thereby prescribed, and powers given to summon meetings, issue

orders, remove officers, fix salaries, make rules for government of the Corporation which were to be laid before the Lord Lieutenant, and if approved of, to be by him confirmed. The only restriction as to filling up vacancies was in the case of the Aldermen who were to be members of the board ; they, as well as the Mayor and Sheriffs for the time being, were to be those only who belonged to the Corporation of the city of Dublin. The Ballast Board consisted originally of twenty-three individuals, and they were not placed there by reason of any connection they had with the Corporation of Dublin : only six of them were so connected ; they were, no doubt, suitable individuals being interested in the peace of the city ; and the Aldermen were selected, doubtless because of their business connection ; but the Ballast Office was entirely taken out of the hands of the Corporation, and constituted not as part of the old Corporation, but as individuals residing in Dublin, who from their avocations had an interest in the preservation of the rights and duties vested in the new Ballast Board. As to the three Aldermen, a provision was made, that their places should be filled up on the nomination of the Lord Mayor and Aldermen for the time being, and if they did not nominate, the nomination then devolved on the Lord Lieutenant.

In the 33 of G. 2 (1759), an Act of Parliament called Lucas's Act materially altered the constitution of the Corporation of the city of Dublin, the manner in which Sheriffs were to be appointed, their duties as Sheriffs, and the qualification requisite for the office. That Act also contained a clause as to the approval of the Lord Lieutenant. These clauses show that an alteration was made in appointing Sheriffs of the city of Dublin ; but in point of fact, their office as members of the Ballast Board was not affected, nor their office as Sheriffs at all affected. After the passing of Lucas's Act, no alteration of any consequence took place in the office of Sheriffs of the city of Dublin. The old Corporation remained in its old corporate form until 1840, the year of the passing of the Municipal Act ; but in the interval, the regulation of the Ballast Board had undergone a total change, and was taken from the old Corporation, *quod* Corporation, and was vested in the members of the Ballast Board, who were constituted a corporate body. At the time of the passing of the Municipal Act, and until the present hour, no change has been made in the constitution of the Ballast Board ; at different times since the passing of the 26 G. 3, their powers have been enlarged by several Acts of Parliament, extending their jurisdiction on the north side of the harbour of Dublin as far as Howth, and on the south side as far as Dalkey. All these Acts of Parliament only served the purpose of giving the members of the Ballast Corporation additional powers, but there was no alteration in its constitution. All that time the Sheriffs for the time being were members of the Ballast Board ; but in 1840, the old Corporation of the city of Dublin was altered in essential matters,

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and in this particular, that whereas heretofore there had been two Sheriffs in the city of Dublin, henceforward there was to be in number only one, that one to be appointed by the Lord Lieutenant.

Then the question arises, has that new Sheriff as such and as incident to his office, a right to be a member of the Ballast Board; and whether he holds the same position as the two Sheriffs formerly had? In my opinion, the present Sheriff appointed under the Municipal Act has a right to be a member of the Ballast Board, incident to his office as Sheriff. In 1840, the old Corporation was not altogether abolished, the Act was but a continuing of the old Corporation, though differing in many respects. Dublin is essentially connected with the port of Dublin, the jurisdiction of the principal peace-officer extends to both sides of the port of Dublin; a Sheriff, therefore, exercising the office of principal peace-officer in the port of Dublin, does not enter on the discharge of new duties, but continues in discharge of duties that Sheriffs had always performed as such members of the Ballast Board. The same person who was answerable for the care of the city and its dependencies, should be continued as a member of the Ballast Board, whose official duties are so essentially connected with the order of the city of Dublin. In commercial towns the Sheriff is called the portrieve, the principal officer of the port as well as peace-officer; and that is another reason why the Sheriff should be *pro tempore* a member of the Ballast Board. He is necessarily resident in his bailiwick, and is of the highest consideration in the county: and though it is said there was a determination in the office of Sheriff, because there is no pecuniary qualification now requisite, yet it is a mistake to say he is to be treated as a person without qualification. The law requires that the Sheriff should be a person who is answerable in issues both to the Queen and to the subject, and he ought to be a proper person for so doing. Another change made in 1840, was, instead of two Sheriffs municipally appointed, there was to be but one; that makes no difference in the eye of the law as to the office of Sheriff, the two make but one officer: *Bac. Abr. Sheriff K*: and further, where the office was held by two persons, they were severally responsible: *Ridings v. Edwin and another (a)*; the office of Sheriff of the city of Dublin underwent no change; and the Sheriff having been a member of the Ballast Board before 1840, he continued in the same position at the Ballast Board, though thenceforward there was but one Sheriff appointed by the Lord Lieutenant, and not municipally appointed by the Corporation. It does not alter this view, that the Lord Mayor is admiral of the port of Dublin; when the 26 G. 3 was passed, the Lord Mayor was admiral then as well as now; that argument is therefore beside the question.

(a) 1 Show. 162.

Now, as to the formal objections:—As to the objection to the first plea, I do not think that there is any thing in it; that objection is a mistake in point of fact, for I think it is averred with sufficient certainty that Sir Edward Borough was appointed Sheriff.

The second special cause assigned to the first and third pleas is, that the Municipal Act is not correctly recited or referred to; and that that Act could not pass in two years but in one year; I am not of opinion that can be assigned by way of objection as a demurrer to a plea; it might be treated as surplusage: *Chance v. Adams*; *The Attorney General v. Tooke(a)*; *Wolsey v. Sheppard*. The case in *Brownlow* goes further; for there it was not a variance but a mistake. Here the Act is a public Act, and a reference to it is merely surplusage; for nothing is depending on the title of the Act; nor is there any particular reference to it. It is enough if any one of the three pleas be sufficient to make good the defendant's title, and I consider that the case of the defendant is sustained by the first and third pleas. On the whole, my opinion is, that the defendant has proved his title, and judgment must be against the relator.

BURTON, J.

In this case I entertain some doubts as to the formal objections not being sustainable on special demurrer; but these being matters of the merest form, and the merits being with the defendant, I am of opinion that judgment should be against the relator.

CRAMPTON, J.

I concur with my brethren in thinking that the substantial question in this case ought to be ruled in favour of the defendant; but I own I cannot go the length of saying, that I consider the formal objections unfounded, for I think that some of them are deserving of an answer.

In the first place, as to the substantial question: it arises on the Act of Parliament, 26 G. 3, c. 19. That statute abrogates the old Ballast Board, thereby depriving the Corporation of Dublin of all power and property in every thing connected with it, and creates a new Corporation in which it vests all the power; depriving all other persons of any right or interest therein. That Act requires that the Lord Mayor and Sheriffs of the city of Dublin for the time being, with certain other persons therein named, should form the new Corporation, that is, the Ballast Board. Now, the question is, whether the Sheriff for the time being, since the passing of the Municipal Corporation Act, is a member of this Ballast Board. It must be admitted, that the character and designation of "Sheriff for the time being," is directly applicable to the present

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Sheriff; he was Sheriff at the time, and therefore comes within the letter of the Act: but then it is said, that we are to understand the Act as enacting, that the Lord Mayor and Sheriffs for the time being, provided they continue corporators, shall be members of this new board. How can we insert such a proviso? The Sheriff for the time being has two-fold duties to perform; one in preserving the public peace, and executing the Queen's writs; and he has also a subordinate duty, as member of the Corporation of the city of Dublin: and we are called on to suppose that he was merely in that subordinate and secondary capacity, a member of the Ballast Board. He ceased by the Municipal Act to be the Sheriff of the Corporation, but he still retained his other rights. But then, it is said, that two Sheriffs were originally appointed, and now there is but one; why, those two were but one in office, although two persons: but again, there is no enactment that this board should consist of members of the Corporation; on the contrary, a provision is made for the admission of a number of Aldermen, not as being Aldermen for the time being, as members of this board. I therefore think, that there is nothing in that part of the Act, and that the Sheriff for the time being is a member of the Ballast Board, because he is Sheriff; and he is not the less Sheriff of the city of Dublin, because he is not a member of the Corporation. I admit, he would not have been made a member of the Ballast Board, if he had not been a member of the Corporation; but the reason of that selection cannot alter the grant. The grant is perpetual; the office is perpetual. On the main question, therefore, I am of opinion, the question is entirely with the defendant.

However, I do not concur in thinking that the special objections are unfounded. The judgment has been given upon the first and third pleas. I do not enter into the second plea: the objection to it in substance is, that it did not show that the now Sheriff corresponds in character with the Sheriffs who had been displaced; but it showed that there was no officer now in the Corporation to correspond with him, or none to be substituted for him. I think this plea informal. The first and third pleas are also informal in the manner in which they have pleaded the Act. These are mere formal objections, but they are not to be overruled, because the merits are on the other side. The case of *The King v. Biers* (a) is a direct authority in support of this objection. The cases cited from *Lord Raymond* and *Hardress* do not apply, because there the mistake was in the title, and the title is no part of the Act. But when a man makes an allegation in pleading, even although unnecessary, if he says that an Act was passed, at a time when it could not have passed, he is bound by that statement, and the Court has pronounced that a ground upon which judgment would be arrested. As to the

(a) 1 Ad. & E. 327.

case in *Brownlow*, a distinction has been taken between a plea and an information or indictment. No doubt, greater certainty is required in a plea than in a declaration; but if the argument be right, less certainty is required in a plea than in an information; but I do not find any case in which that distinction has been taken. This mode of pleading might be looked on as surplusage; the usual mode of pleading a justification under a statute, is to state under and by virtue of a statute in such case made and provided; but when pleaded it must be pleaded correctly: *Bryant v. Withers* (a) is an express authority for this. I therefore feel great difficulty on this, and my opinion is, that these objections are well founded, on special demurrer; but as the defendant has the legal claim to the office, there is no necessity of our deciding in favour of those special objections, but the general demurrer ought to be allowed.

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Demurrer allowed.

(a) 2 M. & Sel. 123.

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STEPHEN FOX DICKSON v. GEORGE PAPE.

(*Exchequer of Pleas.*)

A grocer obtaining the license specified in the 6 & 7 W. 4, c. 38, s. 3, to retail spirits in quantities not less, at one time, than one pint, and to be consumed elsewhere than in the house or on the premises of such retailer, is liable to the higher rate of duty imposed upon retail spirit licenses by the 2nd section and schedule of the 6 G. 4, c. 81., viz.: from £9. 9s. to £13. 13s. according to the value of the premises.
 BRADY, C. B. *dissentiente.*

THIS was an action of *indebitatus assumpsit* for money lent, money paid, and money had and received by the defendant for the use of the plaintiff. Plea, *non assumpsit*.

The case was tried before the Lord Chief Baron at the *Nisi Prius* Sittings after Hilary Term 1843, when the jury found the following special verdict:—That on the 26th of June 1842, the defendant, who was, and still is the collector of excise for the Dublin district, caused a certain notice, partly printed and partly written, to be delivered to the plaintiff, whose house and premises number 52 Townsend-street, in the city of Dublin, had been, and then were duly entered with the excise, for the purpose of having sold therein tea, coffee, and pepper, and also spirits by retail, pursuant to the provisions of the Act of the 6 & 7 W. 4, c. 38, s. 3, in quantities not less than one pint and to be consumed elsewhere than on the premises. This notice was to the following effect:—
 “To Mr. Stephen Fox Dickson, of Townsend-street, in the county of
 “Dublin.—Sir, you are hereby to take notice, that the sitting day for
 “payment of your under-stated duties will be held at the excise-office at
 “Dublin, on the 6th day of July 1842.—J. CUDDIFORD, Officer.

Description of Duty of Licenses.	Rates of Houses.	Amount to be Paid.
Spirit Grocer	£36 0 0	£12 2 6½
Tea Dealer	0 0 0	0 11 6½
Total.	0 0 0	£12 14 1*

“N. B.—The Magistrates’ certificate must be produced before a beer
 “license can be granted, and this paper to be delivered to the person
 “who paid the money.”

That on the 19th of September 1842, at the office of the defendant as collector of excise for the Dublin district in the custom-house, Dublin, the plaintiff being a person in Ireland duly licensed to deal in and sell coffee, tea, cocoa nuts, chocolate and pepper, and a person deemed a grocer within the meaning of the excise laws in force in Ireland, produced the said notice to the defendant, and tendered to him the sum of 11s. 6½d. in said notice mentioned, and demanded a tea dealer’s and also a spirit grocer’s license, pursuant to the said Act of

* This sum is made up of the duty of £11. 11s. imposed by 6 G. 4, c. 81, upon the spirit grocer’s license, and of the duty of 11s. imposed by the same Act upon the tea dealer’s license, together with the additional sum of £5. per cent. superadded to each of the foregoing duties by the subsequent Act of the 3 & 4 Vic. c. 17, s. 1.

the 6 & 7 W. 4, c. 38, s. 3, that is to say, a license to retail spirits in quantities not less, at one time, than one pint, to be consumed elsewhere than in the house or on the premises, as in that Act more particularly mentioned, for the year ending the 5th of July 1843, for his said house, number 52 Townsend-street, which house the jurors found was then rated in the excise books as of the annual value of £36.

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That the defendant, as such collector, granted to the plaintiff the tea dealer's license so demanded, on payment of the said sum of 11s. 6½d., but refused to grant to the plaintiff such spirit grocer's license as aforesaid, unless upon the terms of the plaintiff giving him, the defendant, the said sum of £12. 2s. 6½d., in said notice demanded for the same.

That thereupon the plaintiff tendered to the defendant the sum of £8. 16s. 6d.* for such spirit grocer's license, and demanded the same from the defendant for the said last-mentioned sum of money: that the said defendant refused to grant to the plaintiff such spirit license as aforesaid, unless upon the terms of plaintiff giving for the same the said sum of £12. 2s. 6½d. in said notice demanded: that thereupon the plaintiff paid to the defendant, and the defendant then and there received from the plaintiff the said sum of £12. 2s. 6½d., and by means of such payments the plaintiff obtained the spirit grocer's license, which was in the following form:—

“13 D. N., No. 141. Grocer's License to retail Spirits in Ireland, No. 99.—We whose names are hereunto subscribed and seals set, being the collector of excise of Dublin collection, and the supervisor of excise of first district within the said collection, in pursuance of an Act of Parliament made and passed in the sixth year of the reign of his late Majesty King George the Fourth, entitled ‘An Act to repeal several duties payable on excise licenses in Great Britain and Ireland, and to impose other duties in lieu thereof, and to amend the laws for granting excise licenses;’† and also, a certain other Act of Parliament made

* *Vide* note to the preceding page.

† The 6 G. 4, c. 81, entitled “An Act to repeal several duties payable on excise licenses in Great Britain and Ireland, and to impose other duties in lieu thereof; and to amend the laws for granting excise licenses.”

Section 1, after reciting the expediency of repealing “the several duties and sums of money payable for or upon certain excise licenses in Great Britain and Ireland respectively, and to impose other duties in lieu thereof, and to amend the general laws of excise for granting such licenses,” enacts that “From and after the 5th day of July 1825, all and singular the respective duties and sums of money granted or payable for or upon any excise license in England, Scotland or Ireland, or for or upon the granting thereof by any Act or Acts of Parliament in force at and immediately before the said 5th day of July 1825, or by any other Act or Acts passed in this present Session of Parliament, shall cease and determine, save and except in all cases relating to the recovering, allowing or paying any arrears of such duties and sums of

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"and passed in the sixth and seventh years of the reign of his late Majesty King William the Fourth, entitled 'An Act to amend an Act passed in the third and fourth years of the reign of his present

"money as aforesaid respectively, which on the said 5th day of July 1825, shall remain due and unpaid, and save and except as to any fine, penalty or forfeiture, fines, penalties or forfeitures relating thereto respectively, which shall, on or before the said 5th day of July 1825, have been incurred, and shall then remain due and unpaid, and save and except as to any excise license or licenses theretofore granted, and any bond or bonds made or given by any excise trader before the said 5th day of July 1825, and which shall then remain in force and unexpired."

Section 2 enacts—"That from and after the said 5th day of July 1825, in lieu and instead of the duties by this Act repealed, there shall be raised, levied, collected and paid unto his Majesty, his heirs and successors, in and throughout the united kingdom of Great Britain and Ireland, the several duties of excise, or rates and sums of money hereinafter following; (that is to say), for and upon every excise license to be taken out by any maker, manufacturer, trader, dealer, retailer or person hereinafter mentioned, within Great Britain and Ireland, to be paid by such maker, manufacturer, trader, dealer, retailer and person respectively, the respective annual sum or duty of excise in British currency hereinafter mentioned; (that is to say):" [Here follows the schedule, in which, under the head "spirits," the following clause occurs:—

"Every retailer of spirits (except retailers of spirits in Ireland after men- tioned), if the dwelling-house in which such retailer shall reside or retail such spirits at the time of taking out such license, shall not, together with the offices, courts, yards and gardens therewith occupied, be rated under the authority of any Act or Acts of Parliament for granting duties on inhabited houses, at a rent of £10 per annum or upwards, or shall	£	s.	d.
"not be rented or valued at such rent or annual value or upwards	..	2	2 0
"If the same shall be rated, rented or valued as aforesaid, at £10 per an- num or upwards, and under £20	..	..	.. 4 4 0
"If at £20 and under £25	..	..	.. 6 6 0
"If at £25 and under £30	..	..	.. 7 7 0
"If at £30 and under £40	..	..	.. 8 8 0
"If at £40 and under £50	..	..	.. 9 9 0
"If at £50 per annum, or upwards	..	..	.. 10 10 0
"Every retailer of spirits in Ireland, being duly licensed to trade in, vend and sell coffee, tea, cocoa nuts, chocolate or pepper, and not selling spirits in any greater quantity at one time than two quarts, or any spirits to be consumed in the house or premises of such retailer, if the dwelling- house in which such retailer shall reside or retail such spirits as afore- said at the time of taking out such license, shall not, together with the offices, courts, yards and gardens therewith occupied, be rated under the authority of any Act or Acts of Parliament for granting duties on inhabited houses, at a rent of £25 per annum or upwards, or shall not be rented or valued at such rent or annual value, or upwards	..	9	9 0
"If the same shall be rated, rented or valued as aforesaid, at £25 and under £30	..	..	.. 10 10 0
"If at £30 and under £40	..	..	.. 11 11 0
"If at £40 and under £50	..	..	.. 12 12 0
"If at £50 and upwards	..	..	.. 13 13 0

Section 4 enacts—"That from and after the said 5th day of July 1825, all persons

"Majesty, entitled an Act to amend the laws relating to excise licenses, "and to the sale of wine, spirits, beer and cider by retail in Ireland,"* do hereby license and empower Stephen Fox Dickson, living at 52 Townsend-street Dublin, in the parish of Marks and county of Dublin, and within the said collection, and being a grocer duly licensed to trade in, vend and sell coffee, tea, cocoa nuts, chocolate and pepper, to exercise and carry on the trade or business of a retailer of spirits; but not to sell spirits in any quantity less at one time than one pint, nor any spirits to be consumed in the house or on the premises of such retailer at such place, being described by the said trader as only one separate and distinct set of premises, all adjoining or contiguous to each other and situate in one place, and held together for the same trade or business,

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"who shall be duly licensed under this Act to deal in or sell coffee, tea, cocoa nuts, chocolate or pepper, shall be deemed grocers within the meaning of the several laws of excise in force in Ireland, at and immediately before the passing of this Act, and shall be entitled to take out the license hereinbefore mentioned to retail spirits, in any quantity not exceeding two quarts at any one time, to be consumed elsewhere than in the house or on the premises of such retailer, subject nevertheless to all and every the regulations contained in the said laws, or any of them, in respect of grocers retailing spirits, except so far as the same are repealed or altered by this Act."

Section 7 enacts—"That in every license to be taken out under or by authority of this Act shall be contained and set forth the purpose, trade or business for which such license is granted, and the true name and place of abode of the person or persons taking out the same, and the true date or time of granting such license, and (except in the case of auctioneers) the place at which the trade or business for which such license is granted shall be carried on: Provided always, that persons in partnership, and carrying on their trade or business in one place and set of premises only, shall not be obliged to take out more than one license in any one year, for the purpose of carrying on such trade or business, save and except that each and every person whatsoever exercising or carrying on the trade or business of an auctioneer, or acting as such, shall take out a separate and distinct license for that purpose; any thing herein contained to the contrary thereof notwithstanding."

* The 6 & 7 W. 4, c. 38, entitled "An Act to amend an Act passed in the Third and Fourth Years of the reign of his present Majesty, entitled, 'An Act to amend the laws relating to excise licenses, and to the sale of wines, spirits, beer, and cider by retail, in Ireland.'"

Section 3 enacts—"That from and after the passing of this Act, no person in Ireland who shall be duly licensed under any Act or Acts for granting excise licenses to deal in or sell coffee, tea, cocoa nuts, chocolate, or pepper, nor any person deemed a grocer within the meaning of the laws of the excise in force in Ireland at or immediately before the passing of this Act, shall be entitled to take out any license to retail spirits in the house or on the premises of such retailer, or in any house or on any premises within one quarter of a mile of the house or premises of such retailer, other than a license to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than in the house or on the premises of such retailer; and any license to retail spirits in any other manner granted after the passing of this Act to any such grocer or person so licensed as aforesaid shall be wholly null and void to all intents and purposes whatsoever."

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Exch. of Pleas. "on therein the trade or business as aforesaid, at or before the time of
 DICKSON "granting his license, and not elsewhere, from the day of the date hereof
 v. "until and upon the fifth day of July next ensuing, the dwelling-house in
 PAPE. "which the said trader resides, or is to retail such spirits as aforesaid,
 "together with the offices, courts, yards and gardens therewith occupied,
 "being at the time of taking out this license of the annual value of £36,
 "and he having paid the sum of £12. 2s. 6½d. for this license to the said
 "collector of excise. Dated this 19th day of September in the year of
 "our Lord 1842.

"GEORGE PAPE, Collector (Seal).

"ROBERT HUTCHENSON, Supervisor (Seal).

"J. CUDDIFORD, Officer (Seal)."

That the plaintiff, at the time of the payment of said monies and receipt of said licenses, served a notice in writing upon the defendant, protesting against the demand of £12. 2s. 6½d. for such grocer's spirit license, as illegal, and declaring such payment then made to be on compulsion and not voluntary, and that plaintiff would hold defendant at all times personally liable to him for the amount, and cautioning the defendant against paying over the same to the Commissioners of Excise, or any person or persons other than to him (the plaintiff) or some person duly authorised on his behalf to receive the same, and apprising the defendant that the plaintiff would immediately institute proceedings at law against him to recover back said money as being illegally insisted on by the defendant, under colour of his office of collector of excise.

That the writ in this cause was sued out against the said defendant on the 7th of November 1842, being more than one calendar month next after a notice in writing had been delivered to the said defendant by the plaintiff's attorney, stating the cause of action, and the names and places of abode of the plaintiff and of his said attorney respectively, pursuant to the statute in that case made and provided; that the defendant still holds the aforesaid sum of £12. 2s. 6½d., so received by him from the said plaintiff as aforesaid, and has not paid over the same to the Commissioners of Excise, or any other person or persons.

The verdict concluded with a special finding as follows:—But whether or not, upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the said defendant George Pape did undertake and promise, the jurors aforesaid are altogether ignorant, and therefore they pray the advice of the Court of our said lady the Queen, of her Exchequer at Dublin; and if upon the whole matter aforesaid it shall seem to the said Court that the said George Pape did undertake and promise, then the jurors aforesaid, upon their oaths aforesaid, say that the said George Pape did undertake and promise in manner and form as the said plaintiff, the said Stephen Fox Dickson, hath within

thereof complained against him; and in that case, they assess the damages of the said plaintiff, the said Stephen Fox Dickson, by reason thereof, over and above his costs and charges by him about his suit in this behalf expended, to £—, and for his costs and charges to 40s.; but if upon the whole matters aforesaid, it shall seem to the said Court that the said defendant, the said George Pape, did not promise or undertake, then the jurors aforesaid, upon their oaths aforesaid, say that the said George Pape did not promise or undertake in manner and form as the said Stephen Fox Dickson hath thereof complained against him and so forth; and in that case, they assess the costs and charges of the defendant by him about his suit in this behalf expended to 40s.

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Mr. B. Stephens and *Mr. Napier*, for the plaintiff.—The question raised upon the special verdict is, what amount of duty is properly payable upon the license to retail spirits granted to the plaintiff, which is set out verbatim on the special verdict? The right to that license is given by necessary implication in the 6 & 7 *W.* 4, c. 38, s. 3, to all persons duly licensed to sell tea, &c., who are by the 6 *G.* 4, c. 81, to be deemed grocers, and entitled to the privileges which grocers formerly had in Ireland, of retailing spirits under certain restrictions. There are two Acts referred to in the license as set out. The 3rd section of 6 & 7 *W.* 4, c. 38, first annuls all licenses differing in form from that prescribed, and secondly prescribes a new license differing in several essential particulars from that in force at the time the Act was passed.

The old license, which was granted under the 6 *G.* 4, c. 81, s. 4, expressly enabled the tea dealer or grocer to sell in any quantity, however small, under two quarts; the new license prohibits him from selling in any quantity under one pint, but leaves him at liberty to sell any quantity above a pint within the retail limit. Under the old license he might (if duly licensed) retail spirits as a publican, that is, to be consumed on the premises in his own house, or next door; under the new license he cannot do so within a quarter of a mile. The quantity to be sold was always an essential characteristic of the license; by it the different classes of dealers who paid different amounts of duty were distinguished, of which at one time (by the 32 *G.* 3, c. 19,) there were no less than four; therefore, any change in the quantity changes essentially the license. By the 6 & 7 *W.* 4, c. 38, no duty is imposed on the new license thus created by that Act. It would be therefore free from duty unless there were some other Act by which a duty became properly payable on such a form of license.

It is admitted that the only Act by which the high rate of duty here taken and paid under protest can be supported, is the 6 *G.* 4, c. 81. That Act by the 4th section gives the tea dealer (a class first created in Ireland by the Act) the privileges of the old Irish grocer, of selling

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spirits by retail, and enables him to take out the particular license mentioned in the schedule appended to the 2nd section, which it calls a license to retail spirits in any quantity under two quarts, on payment of the duty. Now, the schedule to the 2nd section contains an enumeration of trades and classes of trades, with a column annexed in which is to be found the duty; and under the general head "spirits" appears two classes of retailers: First, every retailer of spirits (*except retailers of spirits in Ireland, after-mentioned*) with a duty annexed of from two to ten guineas, according to the value of the house; secondly, every retailer of spirits in Ireland, being duly licensed to sell tea, coffee, &c., and not selling spirits in any greater quantity than two quarts, with a duty annexed of from nine to thirteen guineas, according to the value of the house.

The question here is, with which of these two rates of duty is the tea dealer, who takes out the license to retail spirits prescribed by the 6 & 7 W. 4, chargeable? The plaintiff contends he cannot be chargeable with the higher rate, because by the 2nd section of the 6 G. 4, c. 81, the duty is expressly imposed upon the license, not upon the trader; the duty of from nine to thirteen guineas is a duty adapted to and commensurate with the license minutely described in the schedule and 4th section, and payable only on that particular form of license. Now, that license is made null and void, and thereby the 4th section in that respect is repealed by the 6 & 7 W. 4; the necessary consequence of which is, that the duty which was only payable on that form of license cannot be imposed upon a new form of license essentially differing from it, without express words of the Legislature. In effect, the duty is repealed by the repeal of the license.

It may also be contended, that the duty of from two to ten guineas is equally inapplicable to the plaintiff's license, and that such license is consequently duty free. If there be any doubt in the matter, the subject should have the benefit of the doubt, and ought not to be taxed except by clear and unambiguous words: *Reed v. Wilmot* (a); *The Earl of Courtown v. Breen* (b); *Doe d. Scruton v. Smith* (c); *Warrington v. Furber* (d); *Lessee Nagle v. Ahern* (e); *Brandling v. Barrington* (f); *Jones v. Sandys* (g); *Casher v. Holmes* (h).

On these grounds the plaintiff is entitled to have the verdict entered

(a) 7 Bing. 582.

(b) M. S. Mockler's Stamp Laws, 315.

(c) 1 M. & Sc. 237.

(d) 8 East, 242.

(e) 3 Ir. Law Rep. 48. See also *The Attorney-General v. Dunn*, 1 Ir. Law Rep. 363; *King v. Winstanley*, 1 Cr. & Jer. 441; and *Lessee Lynch v. Lynch*, 4 Law Rec. O. S. 227.

(f) 6 B. & Cr. 475.

(g) 2 Barnes, 379.

(h) 2 B. & Ad. 592.

up for him, either for the full amount of duty paid, in case the license should be held to be free from duty, or at all events for the difference between the sum paid and tendered, in case the latter should be considered the sum legally payable. But in no case can the defendant be entitled to the verdict, unless the Court should hold the old duty payable upon the new license, without either express words or necessary implication.

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Mr. *Jebb* and Mr. *Bennett*, Q. C., for the defendant.—The question is, what amount of duty the plaintiff, as a person selling tea, coffee, cocoanuts, chocolate and pepper, is entitled to pay for a license under the 6 & 7 W. 4, c. 38, s. 3, to “retail spirits in quantities not less than one pint, and not to be consumed on the premises;” that is, the only kind of spirit license a grocer now can have. That statute does not fix any amount of duty, and therefore the amount must be ascertained from the General License Act, 6 G. 4, c. 81, s. 2, schedule. The first clause in the schedule relating to this subject imposes a duty varying from £2. 2s. (according to the value of the house) on *every retailer of spirits, except retailers of spirits in Ireland after mentioned*. Those “retailers of spirits after mentioned” are described in the subsequent clause, and a higher rate of duty is imposed on this class than on the former, *i. e.*, a rate varying from £9. 9s. upwards, according to the value of the house. It is contended, on the part of the defendant, that the plaintiff is bound to pay the higher rate of duty mentioned in the second clause. That clause applies to the license taken out by the plaintiff, with the exception that the restriction “not selling in greater quantities than two quarts” is removed, and that instead thereof a new proviso is added, *viz.*, “not retailing in quantities less than one pint.” But the insertion of this restriction to a *minimum* does not affect the case; for the plaintiff is still a retailer of spirits duly licensed to sell coffee, tea, &c., and not selling spirits to be consumed on the premises, and therefore the question comes to this, does the removal of the restriction to a *maximum*, *i. e.*, the not selling in greater quantity than two quarts, prevent the plaintiff from being charged with the higher rate of duty?

First, as to the obvious intention of the Act. The object of the two Acts is the same, *viz.*, to prevent *grocers* from carrying on the business of *publicans*, “a practice which was found to be attended with pernicious consequences,” *per* Bushe, C. J., in *Boland's case* (a), and to make grocers take out a distinct license altogether from publicans; for which (the grocer's license) a higher rate of duty was to be paid. That a grocer cannot take out a publican's license, or any other than that mentioned in

(a) 2 J. & S. 249.

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the 6 & 7 W. 4, c. 38, s. 3, is decided in *Reg. pros. Boland v. Commissioners of Excise (a)*. If this is the intention, then comes the question, what is a *grocer* within the meaning of the Act? It is defined in sect. 4 of the License Act (6 G. 4, c. 81), "all persons who shall be duly licensed under this Act to deal in or sell coffee, tea, cocoa nuts, chocolate or pepper shall be deemed grocers within the meaning of the excise laws." The plaintiff comes within this description, and his case quite within the policy of the Act; and it cannot be contended that because he is no longer prevented from selling more than two quarts at a time, he is on that account alone to be exempted from the higher rate of duty to which grocers retailing spirits are subject.

But even without resorting to an argument from the intention of the Legislature, we contend that the plaintiff's case is within the reasonable construction of the words of the License Act. The words "and not selling in greater quantities than two quarts" were introduced evidently because no spirit license was then allowed to a grocer without such a qualification, and to guard expressly against any license being given to such a person in any other form. But they form no part of the definition of the sort of person who is to take this particular kind of license; that person is a grocer, and these words are merely a qualification, or matter of regulation. This is shown in several instances in this and other Acts; *e.g.*, in sect. 26, imposing penalties on persons not taking out the license required by the Act; a distinct penalty, *viz.*, £100, is given against "retailers of spirits in Ireland being licensed to sell coffee, tea," &c. (not alluding to the *maximum* at all); and a distinct penalty of £50 against "every retailer of spirits not being a retailer of spirits in Ireland duly licensed to sell coffee, tea," &c. This clearly shows that the restriction to a *maximum* is merely a matter of regulation, and is not necessarily appended to the description of person who may incur a penalty of £100 for not taking out the license in that behalf required, namely, the license subject to the higher duty. If an information were filed against a grocer for retailing spirits without license under that Act, it would state in the very words of this clause that the defendant "was a retailer of spirits in Ireland, being licensed to deal in, &c., tea, coffee, &c., and sold, &c., without taking out such license as in that behalf required." The defendant then would clearly be obliged to show that he took out the greater license; for the license in that behalf is treated as quite distinct from the license the neglect to take out which incurs only the £50 penalty. So in the present case, the plaintiff is a "retailer of spirits in Ireland, being licensed to sell coffee, tea," &c., and it makes no difference that he is also obliged to sell not less than one pint at a time.

(a) 2 J. & S. 243.

It may be said, that the defendant's proof of a license in that behalf would not be referable to the 6 G. 4, c. 81, as the words of sect. 26 are merely "in that behalf required," not "by this Act," and that, therefore, he would only have to prove a license under the 6 & 7 W. 4, c. 38, for which no duty at all is provided. But it is absurd to suppose that twice as great a penalty is to be imposed on a person not taking out a license for which no duty at all is payable, supposing that possible, as upon a person not taking out a license for which duty is payable, *i. e.*, a publican. In sect. 4 of the License Act, the matters of regulation, of which the defendant contends this *maximum* restriction is one, is noticed; and it is said that persons may take the license thereinbefore mentioned subject to the regulations contained in that Act and the former Excise Acts; but for that mention of former Acts only, this clause would expressly apply to the present case; it shows however, that these matters of regulations are not to be taken as part of the definition of the persons who are to have a grocer's spirit license.

Another proof that such is the true construction, occurs in the 4 & 5 W. 4, c. 75, s. 8 (the Additional License Duty Act), providing "that nothing herein contained shall extend to enforce any additional duty on any license to retail spirits to be taken out by any person in Ireland duly licensed to trade in, vend and sell coffee, tea, &c., and not selling spirits to be consumed in the house or on the premises of such retailer;" thus showing what the description of the license really is. The plaintiff contends that the spirit retailer mentioned in the first clause of the schedule means a publican. If any duty be at all payable in this case, this is a strong argument for the defendant; because it has already been decided in *Boland's case* (a), that a grocer cannot have a publican's license; but there is no other license subjected to duty but that mentioned in the second clause, and the duty therein mentioned must be what is payable by the plaintiff.

So far it has been assumed that the license is subject to some duty or other, but for the plaintiff it is further contended that no duty at all is payable. In the first place, this question is not open on the record, the action being only for the difference. But supposing it to be open, it is quite clear that the right to a license is not a common law right, whatever the common law right to sell any particular article may be. In this instance the right to a license is given by the 58 G. 3, c. 57, s. 2, an Act still in force, which, after saying that grocers "shall be capable" of holding a spirit license, makes the payment of duty a condition precedent to the selling. It is true that the particular duty referred to by that Act (*viz.*, the duty under the 55 G. 3, c. 19) is abolished; but the duty under the 6 G. 4, c. 81, is substituted in lieu of it; and therefore the payment of duty,

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The case was again argued in this Term by Mr. Napier on the part of the plaintiff, and by Mr. Jebb on the part of the defendant.

Cur. ad. vult.

T. T. 1844. A difference of opinion having taken place upon the Bench, their Lordships now delivered judgment *seriatim*.

May 7.

LEFROY, B.

This case comes before the Court upon a special verdict, in an action brought in point of form for money had and received, and on the other money counts; but in point of substance, to try the right of the defendant to receive a "grocer's spirit retail license," on the payment of a duty less in amount than the sum claimed by the defendant, the officer whose duty it was to grant the license; which sum the defendant having paid as under compulsion, in order to obtain that license, he now brings this action to recover back the difference between the greater and the lesser duty.

The Jury have found all the material facts necessary to raise the question of right; they have found the notice that was served by the defendant, Pape, as collector of excise in the Dublin district, calling upon the plaintiff, Dickson, to take out a "license," a "grocer's license," and a "grocer's spirit retail license," and to pay the duties thereon respectively imposed by the 6 G. 4, c. 81, and under the 6 & 7 W. 4, c. 38; insisting by this notice, that under the joint operation of these two Acts of Parliament, he was bound to pay a duty for the grocer's spirit retail license of £12. 2s. 6½d. and for the grocer's license a duty of 11s. 6½d., making together the sum total of £12. 14s. 1d.; that duty being claimed as an assessment upon the value of the house as belonging to a person claiming to be entitled to a grocer's spirit retail license.

The special verdict finds, that the plaintiff accordingly came in and paid the grocer's license of 11s. 6½d., thereby admitting that he stood in the position, and desired to stand in the position of a licensed grocer; but he then claimed to take out a grocer's spirit retail license, in the terms of the 6 & 7 W. 4, c. 38, on the payment not of the sum claimed as having been assessed as the value of the house which he occupied as a grocer, but on payment of a lesser sum, namely, £8. 16s. 6d., which would be according to the assessed value of the house under the 6 G. 4, of a general retailer of spirits. If the dwelling-house of such retailer be of the value, at the time of taking out such license, of £30, and under £40, he is to pay so much*. That sum having been tendered, and the

* *Vide* Schedule 6 G. 4, c. 88., *ante* p. 76, n.

tender having been refused by the defendant, the collector of excise, and he having refused to grant a license upon any other terms than upon the payment of the larger sum, the special verdict finds that, accordingly, that larger sum was paid, and the license taken out under protest; and the question referred to the Court by the Jury is, whether the plaintiff was entitled to get the license which he sought, upon the terms of paying the lesser duty, or whether the defendant rightfully insisted on the payment of the larger sum?

That question arises on the construction of two Acts of Parliament taken together; the 6 *G.* 4, c. 81, and the 6 & 7 *W.* 4, c. 38. By the first of these Acts, entitled, "An Act to repeal several duties payable on excise licenses in Great Britain and Ireland; and to impose other duties in lieu thereof, and to amend the laws for granting excise licenses;" the former laws relating to excise licenses and the duties payable thereon were repealed; and then came this enactment, which purports to be a consolidation and foundation, as it were, on which for the future was to rest the regulation of *all* excise licenses, and *all* duties payable thereon; and the second section enacts, "That from and after the 5th day of July 1825, in lieu and instead of the duties by this Act repealed, there shall be raised, levied, collected and paid unto his Majesty, his heirs and successors, in and throughout the United Kingdom of Great Britain and Ireland, the several duties of excise or rates and sums of money hereinafter following, that is to say, for and upon every excise license to be taken out by any maker, manufacturer, trader, dealer, retailer or person hereinafter mentioned, within Great Britain and Ireland, to be paid by such maker, manufacturer, trader, dealer, retailer, and person respectively, the respective annual sum or duty of excise in British currency hereinafter mentioned" (that is to say), viz., "Every retailer of spirits, except retailers of spirits in Ireland, being duly licensed to trade in, vend and sell coffee, tea, cocoa nuts, chocolate or pepper, and not selling spirits in any greater quantity at one time than two quarts, or any spirits to be consumed in the house or premises of such retailer, if the dwelling-house in which such retailer shall reside or retail such spirits as aforesaid, at the time of taking out such license, shall not be rated at a rent of £25 per annum or upwards," &c.; and "if the same shall be rated, rented or valued as aforesaid, at £30, and under £40," then every such retailer shall pay a license duty of £11. 11s. 0d. That is the rate at which the plaintiff's house is valued, and if he comes within that part of the schedule, he must pay this which is called the higher duty, if he seeks to take out a grocer's spirit retail license.

It appears to me that the object of the first part of this description was to ascertain the class of persons who were to take out a license paying this duty; and next, to ascertain the nature and terms of the license to be taken out. If a grocer, therefore, were to take out a license under

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this Act, as a grocer, he could not be entitled to a license qualifying him to retail spirits without paying the augmented duty: but even on payment of this duty, he could not be entitled under this Act to a spirit retail license, other than a qualified license, qualified by the description here, by which he would be bound to sell in not greater quantities than two quarts at one time, and he should not sell any spirits at all to be consumed upon the premises; the qualifying words are, "and not selling spirits in any greater quantity at one time than two quarts, or any spirits to be consumed in the house or premises of such retailer." Now, the question is, what did the Act mean by this? It appears to me, that the Act of Parliament has two objects in view,—one to ascertain the duty to be paid by the general retailer of spirits, not being a grocer, and the other to ascertain the duty to be paid by the grocer who thought fit to take out a retailer's spirit license, but that no grocer could get a retailer's spirit license upon any other terms, or to any other extent, or for any other purposes, than qualified as it was by the Act; and, therefore, the Act amounts in my mind to this: No grocer shall get a general retailer's license unless he is satisfied to take it in the terms here specified; and taking it in these terms, he shall pay the larger amount of duty. That those are the clear and manifest objects of the Act, appears to me quite plain on reading the different sections: by the 4th section it is enacted, "That all persons duly licensed to sell coffee, tea, cocoa nuts, chocolate or pepper, shall be deemed grocers within the meaning of the several laws of excise in Ireland, and shall be entitled to take out *the license hereinbefore mentioned*, to retail spirits in any quantity not exceeding two quarts at any one time, to be consumed elsewhere than in the house or on the premises of such retailer, subject nevertheless to all and every the regulations contained in the said laws, or any of them, in respect to grocers retailing spirits."

Then comes the 7th section, which directs that the license shall state on the face of it the purpose for which it is taken out; it must state the purpose, trade or business for which such license is granted, and the time, name and place of abode of the person or persons taking out the same; and the true date or time of granting such license. And then comes the 26th section, by which penalties are imposed upon persons dealing in, retailing, or selling any goods or commodities hereinafter mentioned, or exercising or carrying on any trade or business hereinafter mentioned, for the making, or manufacturing, or dealing in, retailing or selling of which goods or commodities, or for the exercising or carrying on of which trade or business a license is required by this Act, without taking out such license as is in that behalf required. Then comes a description of persons who would incur the penalty by not complying with the terms of the Act; and in that description we find persons who retail spirits without being *duly* licensed.

Every retailer of spirits subjects himself to a penalty unless he has

taken out the license "thereinafter mentioned." Now, who are those retailers? They are divided in two classes; first, every retailer of spirits in Ireland "being licensed to trade in, vend and sell coffee, tea, cocoa "nuts, chocolate or pepper;" and secondly, "every retailer of spirits "not being a retailer of spirits in Ireland duly licensed to sell coffee, "tea," &c.; accordingly, therefore, by this Act, there was a penalty on every person retailing spirits as a grocer, who did not take out the grocer's spirit license as hereinafter mentioned; and on every person not licensed as a grocer who should not take out the license suitable to a person not licensed as a grocer. On the face of the Act, therefore, there was a clear specification of two classes of persons—"those not taking out the grocer's license;" and the other class, "those who took out the grocer's license;" and the Act provides for those two classes, by pointing out a different amount of duty to be paid, according as a party was a grocer, or was not a grocer; and there was, also, by that Act a clear specification of the two classes of licenses that were to be taken out by the two classes of persons, according as the claimant was a grocer, or was not a grocer.

Under that Act, therefore, I am clearly of opinion, it would be impossible that any question could arise. It must, I should think, be admitted on all hands, that there could be no doubt whatever, that if the plaintiff had been confined to that Act, he must have paid for the grocer's spirit retail license the larger amount of duty. It is very true, under that Act, the terms on which he would have got the license would have been, that he could not sell in quantities larger than two quarts, and not any not to be consumed on the premises; those were the terms attached to that license.

Then, the next question is, has any thing occurred to repeal this Act of Parliament, as far as it required the duty to be paid by a grocer on taking out a license for retailing spirits; is he entitled at this day to obtain such license without paying the higher rate of duty which, under 6 G. 4, he should have paid, and paying only the lesser amount of duty such as a general retailer (not a grocer) should have paid under that Act? It has been argued that the 6 & 7 W. 4, c. 38, gives him that title. Now, what does that Act purport to be? It purports to be an Act to amend an Act—the Act of 3 & 4 W. 4, which was an Act to amend the 6 G. 4; so that the Act 6 & 7 W. 4, is in terms an Act to amend the Act 6 G. 4, and it specifies as to this subject the nature of the amendment. The words are:—"And whereas it is expedient to "amend the said Acts in certain particulars, *and to make other regulations in respect of the sale of wines, spirits, beer and cider, by retail "in Ireland;*" and then comes the 3rd section, which contains this enactment:—"And be it further enacted that from and after the passing "of this Act, no person in Ireland who shall be duly licensed under any

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 v. "immediately before the passing of this Act, shall be entitled to take out
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 "retailer, or in any house, or on any premises within one quarter of a
 "a mile of the house or premises of such retailer, other than a license to
 "retail spirits in quantities not less at one time than one pint, and to be
 "consumed elsewhere than in the house or on the premises of such
 "retailer; and any license to retail spirits in any other manner, granted
 "after the passing of this Act, to any such grocer or person so licensed
 "as aforesaid, shall be wholly null and void."

That section alters the nature of the license which a grocer was entitled to take, or was bound to take. That, however, is not the question; but the question is, does it exempt a grocer from taking out a license? and if it does not exempt him, does it entitle him to take out a license without paying any duty, or on paying not the duty that was imposed on the grocer's license by the 6 G. 4, but the duty that was imposed on the general retailer's license? Is there any thing in this section importing any thing to exempt a grocer from taking out a license? On the contrary, it regulates the terms in which, in future, it shall be granted; there is no intimation showing that a grocer is exempted from taking out a license, if he means to be a retailer of spirits; there is not a word intimated by the Legislature that that was their intention; it is still as a grocer he must apply for his license as a retailer of spirits; and if he is to pay any license, and it is admitted he is to do so, it must be as a grocer, by the very terms of this section; and if he is to take a license as a grocer, and to pay a duty for it, where can we find that duty but in the 6 G. 4? for the 6 & 7 W. 4 points out none.

He is a grocer, and he comes to the collector, and he desires, holding in his hands his grocer's license, to have from him a general retailer's license. Where is his title to it? He has a title to a grocer's license, but he has no title to a general retailer's license, and no such license can be issued to him; he must take the qualified license provided for him under this Act of the 6 & 7 W. 4, the duty upon which must be paid according to the scale laid down in the former Act; for there is none other provided for that license: so that it really comes to the question, did the Legislature mean to exempt him from paying any duty whatever? If that be the case, this section in the Act of *William* must go to repeal altogether the 26th section in the Act 6 G. 4, which obliged all persons who take out license as grocers, under a penalty, to take out license for grocers as set out in that Act. The penalty could not be enforced against them under that penal section which imposes the obligation on general

retailers, for they are not general retailers within the meaning of that section whilst they are grocers.

I confess it appears to me, therefore, on these two Acts of Parliament taken together, that any man taking out a license as a grocer, although that license unquestionably is not in the terms in which it would be conceived under the former Act, and therefore does not bring him within all the terms of the exception as set forth in that Act, is within the substance of the exception as a grocer; and though the terms of the license be different, these terms must be considered as substituted in place of the other, the Acts, being in *pari materiâ*, one an amendment of the other. I am, therefore, of opinion, that there should be judgment for the defendant on this special verdict.

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RICHARDS, B.

The 6 *G.* 4, c. 81, repeals all duties theretofore payable upon excise licenses and imposes new duties.

By the 2nd section of that Act a duty is imposed upon all persons taking out a spirit retail license (which I shall call the publican's license), but which by express exceptionary words in that part of the schedule grocers were not entitled to obtain; we find, however, that in a subsequent part of the schedule provision is made in respect to a grocer's retail spirit license, and that a license of that description was subject to a different and to a higher duty than a publican's license, and was subject to restrictions from which a publican's license was free, viz.,—that not more than two quarts should be sold on the premises at any one time, and that not any quantity should be sold for consumption on the premises.

This Act shows, I think, very plainly, as plainly as language can speak, that it was not the intention of the Legislature that grocers should be allowed to take out a general retail license. The next Act that I think it material to refer to is the 6 & 7 *W.* 4, c. 38; by that Act, section 3, no doubt, the regulations made by the 6 *G.* 4, in respect to the sale of spirits by grocers' taking out a grocer's spirit retail license were varied. By the former Act, as I have already observed, grocers having a retail spirit license could not sell more than two quarts at any one time, and could not sell at all for consumption on the premises: by the latter Act grocers taking out a grocer's spirit retail license were authorised to sell any quantity from a pint upwards, but nothing less than a pint, and could not sell at all for consumption on the premises.

Now, in my opinion, these two Acts must upon every rule and principle of construction be construed together, and consistently, unless where the provisions of the former are altered by the latter, either by express enactment or necessary implication; and the latter Act, as far as can be done, should be construed rather as a graft upon than as a repeal

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of the former Act, except as far as I have mentioned. By the 7th section of the first of these Acts, the form or contents of the license is given, and which form is as applicable to a license obtained subsequently as prior to the 6 & 7 *W.* 4. The last mentioned Act, in my apprehension, intended to enact, and to enact nothing more in that behalf than that a grocer obtaining "a retail spirit license," instead of being confined to the restriction contained in the 6 *G.* 4, and governed by the regulations prescribed by that Act as to quantity, should have much more enlarged powers of sale as to the *maximum*, and be at the same time circumscribed as to the *minimum* quantity to be sold; but that a "grocer's spirit retail license" should be taken out by all grocers before they could in any form retail spirits, was expressly enacted by the first of these Acts; and so far from that provision being repealed, it was, in my opinion, manifestly contemplated by the second Act to which I have referred that it should still have continuance; in fact, the 6 & 7 *W.* 4 proceeded on the assumption that it was necessary for grocers to take out a "grocer's spirit retail license" before they could in any form retail spirits.

I admit the principle, that a duty is not to be imposed upon the subject by ambiguous words in an Act of Parliament; but where a duty is imposed by clear and plain language upon the public generally, and where a different duty is imposed by as plain and clear words upon a particular class excepted out of the general public and not deemed entitled to as favourable terms as the general public,—I am of opinion, that I ought not, unless upon reasonably plain and clear grounds, to hold that it was the intention of the Legislature at a subsequent period to free such class from all duty, that is, from a liability to pay any duty whatsoever (for that is the question), leaving the duty still on the public generally as originally imposed. Now, I must confess, I do not feel bound against the *rationale* of the case, and against what I cannot but think was the true and real meaning and intention of the Legislature, to hold that the duty originally imposed by the 6 *G.* 4, upon the class to which I have referred, viz., grocers, was repealed by the 6 & 7 *W.* 4. I do not say, intended to be repealed, for that, I think, has been scarcely argued, and manifestly such was not the intention; but constructively and legally repealed, that is, repealed by some necessarily implied construction of law, without regard to the real intention. Now, for myself, I will say, that I see no such necessary implication in the 6 & 7 *W.* 4, on the contrary, I think the 6 & 7 *W.* 4 may upon this point well stand with the 6 *G.* 4; and therefore I am of opinion that grocers, taking out a spirit retail license, are bound to pay the duty prescribed for such class of persons by the 6 *G.* 4, c. 81.

If I am right in this view of the case, it becomes unnecessary to consider the different other Acts of Parliament to which we have been referred.

PENNEFATHER, B.

I cannot say that I consider this case as clear as it might be desired, or as it would have been easy for the Legislature to have made it; and I the more particularly say so, as my Lord Chief Baron differs from the opinion which the majority (among whom I am) of the Court entertain. I quite agree, that if the matter be so doubtful that the intention of the Legislature cannot be fairly made out, or if the words be so ambiguous that a sound construction cannot be arrived at, the subject should have the benefit of such doubt, and that a duty ought not to be levied which does not clearly appear to have been intended by the words of the Act of Parliament. That principle has been laid down by most eminent Judges; and it is a principle from which I would be very sorry to depart. It is, however, the duty of the Court carefully to examine the enactments, in order to ascertain if there be such doubt, or whether a plain intention is not to be inferred.

The question arises here upon the construction of two Acts of Parliament—namely, the 6 *G.* 4, c. 81, and the subsequent enactment of the 6 & 7 *W.* 4, c. 38. If the matter rested on the former of those statutes, no possible doubt could be entertained of the meaning of the Legislature. That Act (the 6 *G.* 4, c. 81) was made for the purpose of consolidating the duties which had been payable in this country and in England, and to bring into one code the several Acts of Parliament which had been in existence. The clause in 6 *G.* 4, connected with the present question, enacts, that “Every retailer of spirits in Ireland, being duly licensed to “trade in, vend and sell coffee, tea, cocoa nuts, chocolate or pepper, and “selling spirits in any greater quantity at one time than two quarts, or any “spirits to be consumed in the house or premises of such retailer,” shall pay, according to the value of his house and premises at the time, for his license, which in the present case amounts to the sum of £11. 11s. It is quite clear, then, that if the matter rested on that, this person, who is found by the special verdict to have taken out a license as a grocer, and who is to be considered as such within the meaning of this clause, would have to pay a sum of £11. 11s. for this license. It is to be observed, that grocers not only have certain peculiar restrictions imposed upon them by their licenses, but they have by the Act the peculiar privilege, which other retailers of spirits have not, that they are entitled to have a license without any application to, or any examination before the magistrates.

We come now to the subsequent Act of the 6 & 7 *W.* 4, c. 38, which was passed, as has been already observed, to “amend and continue” the 6 *G.* 4, as also “to amend and alter” a previous Act of Parliament—namely, the 3 & 4 *W.* 4, which had been made for a similar purpose; and therefore I agree with my Brethren, that the two Acts of Parliament must be taken together, and must be considered as a con-

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tinuing enactment; and that the clause as found in the first Act must be continued, and must be considered to operate, unless it is expressly repealed by a subsequent Act; or unless the enactments of the second Act are irreconcilable with it: and therefore, we are now to see what is the effect of the 3rd section of the latter Act, which says, that "From and after the passing of this Act, no person in Ireland, who shall be duly licensed under any Act or Acts for granting "excise licenses to deal in or sell coffee, tea, cocoa nuts, chocolate "or pepper, nor any person deemed a grocer within the meaning "of the laws of the excise in force in Ireland, at or immediately "before the passing of this Act, shall be entitled to take out any license "to retail spirits in the house or on the premises of such retailer, or in "any house, or on any premises within one quarter of a mile of the "house or premises of such retailer, other than a license to retail spirits "in quantities not less at one time than one pint, and to be consumed "elsewhere than in the house or on the premises of such retailer." The clause is silent as to the sum to be paid; but the question is, must not the sum to be paid, in the absence of any express alteration, be that provided by the 6 G. 4, of which the 6 & 7 W. 4 is a continuation and amendment; and is not this a necessary implication? If I did not think so, I would adopt the principle that I set out with—namely, that the subject should not be taxed by a doubtful or an ambiguous enactment. Now, no intention on the part of the Legislature to make an alteration in the amount of the sum to be paid appears; nor is the grocer deprived of the privilege of obtaining as of right his license.

The matters to be done under the license by the party in the carrying on of his business are altered; but he gets the license on the same terms, without application to magistrates or others, as provided by the 6 G. 4, and in the absence of the provision for the payment of a different sum, it strikes me necessarily on payment of the sums provided by that Act.

If he were entitled to a license, as he insists he was, he was entitled because he claims it *ex debito justitiæ*; he must claim it as a grocer under that clause of the 6 G. 4, which gives it to him on the payment of the sum mentioned in the schedule to that Act. I cannot conceive that he can be entitled to a general publican's license; he never was entitled. A publican is not entitled to any license until his claim is approved of by the magistrates or proper authorities; but the grocer is so entitled. The 6 & 7 W. 4 alters essentially, perhaps to inconvenience in some respects, the provisions mentioned in the license, and the matters to be performed by him; but still it leaves the license as a license, and the right of the person claiming the license,—the right of the grocer *ex debito justitiæ* to have a license at all,—untouched and unaltered; and when he does claim the benefit of a license, it must be under the regulations of the Act of the 6 G. 4, as to the amount of duty; and he must take

it in the incumbered manner, if it be so considered, mentioned by the 6 & 7 W. 4; he must take it *cum onere*; he must pay the duty provided for by such license; he cannot, as it strikes me, be entitled to a general publican's license on paying the duty of a publican, which, according to the value put upon the plaintiff's house, would be £8. 8s. per year; and there is less reason to say that he is entitled to a license without paying any duty at all. As I said before, the Legislature has not left the case as clear as it might have been; they have not imposed the duty by express words in the latter statute, but they have left the duty imposed by the former statute to remain; and in my mind, have said by necessary implication, that it ought to be paid by the person who obtains as of right a license.

I therefore concur in opinion with my Brethren who have so ably discussed this case, that judgment should be for the defendant upon this special verdict.

BRADY, C. B.

In this case, I have the misfortune to differ from the judgment pronounced by my learned Brethren; and having entertained that difference of opinion for a long time, I have felt it my duty to consider and reconsider the matter both before the present day, and also, as well as I could do so, during the observations which have fallen from the Court,—because I was most anxious, up to the last moment, to bring my mind, if possible, to concur with the opinion pronounced by the majority of the Court, for whose judgment, it is needless for me to say, I entertain the highest respect; but on every consideration that I could give this question, I have felt myself, after some fluctuation, compelled to declare that, in my opinion, judgment ought to be entered for the plaintiff.

By the 6 G. 4, c. 81, s. 2, certain rates of duty are provided for licenses grantable to various classes of trades; and so far as regards retailers of spirits, that section and the schedule comprised in it divides them into two classes;—one class comprises retailers generally, without further or other description, “every retailer of spirits,”—that is the first class. The next class is described in the subsequent part of the schedule; they are referred to in the former part by an exception, “every retailer of spirits” is the general class, “except retailers of spirits after-mentioned,”—that is the second class of retailers; and they are then more fully described in the subsequent part of the schedule in these words:—“Every retailer of spirits in Ireland, being duly licensed “to trade in, vend and sell coffee, tea, cocoa nuts, chocolate and pepper, “and not selling spirits in greater quantity at any one time than two “quarts, or any spirits to be consumed on the premises of such retailer.” That is the description of the second and excepted class; and I read that schedule thus; the words of the preamble are—[His Lordship

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here read the preamble.]—Now, I read that in this way :—“ There shall “ be paid on every excise license taken out by every retailer of spirits, “ except those after mentioned, the sum of so much ; and there shall be “ paid on every license taken out by every retailer of spirits duly licensed “ to trade in, vend and sell coffee, tea, chocolate, cocoa nuts and pepper, “ and not selling spirits in quantities over two quarts at one time, a sum “ of so much, according to the rate or value set upon his premises.”

This is not the first Act of Parliament in which these classes of retailers are distinguished, because they were for a long time dealt with separately ; the last Act on the subject being the 58 *G. 3*, c. 57, s. 2, which placed on grocers, taking out retail spirit licenses, the same restrictions exactly that we find comprised in this schedule—namely, that they must sell no less than two quarts at a time, and sell none to be consumed on the premises. In the former Act I do not find that there was any schedule divided in this way ; grocers were declared capable of getting the general retailer's spirit license, and they obtained it for a long time ; and they not only obtained it, but for a considerable time they got it upon cheaper terms than publicans or than any body else ; but what they got under the former Act was not a special license describing their trade in any particular way ; it was, as I collect from the Act, in form the general retailer's license, subject, however, to the restrictions imposed by the Act. By the 58 *G. 3*, c. 57, the rates of duty were made equal on both ; but by the 6 *G. 4*, c. 81, an alteration was made, and they are charged higher for their license, which is for the first time put into the schedule as a separate and distinct license.

Now, on this special verdict, it is contended, in the first place, on the part of the plaintiff, that by reason of the Act of 6 & 7 *W. 4*, c. 38, the distinction of duty no longer exists, that a licensed grocer is now entitled to a retailer's spirit license, at the same rate of duty as an ordinary retailer. It was indeed further contended in argument, that there was no longer any duty at all payable on a spirit retailer's license, obtained by a grocer ; but this latter part of the argument was, I think, properly abandoned. The language of the 6 *G. 4* is as plain as can be, as to the rate of duty to be paid upon the license taken out by every retailer of spirits with one exception,—that exception having relation to the licenses to be taken out by grocers ; and if that exception has been removed, then grocers taking out a spirit retailer's license are retailers of spirits, and are as such included in the general words of that schedule, in that part of it which is silent as to the mode of carrying on business, and bound at all events, to pay the duty assigned on the general class. The question then, in my mind, is this—does the exception exist ? This depends on the 6 & 7 *W. 4*, c. 38, s. 3.

No question is raised by the special verdict which calls upon us to consider a matter stated and commented on at the Bar, namely, that

prior to the passing of the latter Act, grocers were in the habit of taking out the general retailer's spirit license, by first getting a beer license and then taking out the retailer's spirit license. Upon what construction, or mistaken view of the law, this practice was founded, it is not necessary here to inquire; it is not found as a fact on this special verdict, that such licenses were so obtained; and the present question is one raised upon the class of licenses to which the licensed grocer is, as such, by law entitled, and not on the general class of licenses, to which no trader could or can be entitled without the previous sanction of the magistrates or Court of Quarter Sessions. Now, by the 4th section of the 6 G. 4, c. 81, a grocer is declared entitled to the license to retail spirits in quantities not exceeding two quarts at one time; and for this license, a special duty is provided. That section enacts, "That from and after the said 5th day of July 1825, all persons who shall be duly licensed under this Act to deal in or sell coffee, tea, cocoa nuts, chocolate, or pepper, shall be deemed grocers within the meaning of the several laws of excise in force in Ireland, at and immediately before the passing of this Act, and shall be entitled" (entitled to what?) "to take out *the* license hereinbefore mentioned." That is describing the thing they are to get; it is a thing specified in the Act as being in itself not a general license, but the particular license in the particular way specified. It is not the general license provided by law, but the license "before-mentioned," embodying all the provisions of that section of the Act; and that being the case under the 6 G. 4, I come now to see what is the enactment of the 6 & 7 W. 4, c. 38. I will read the 3rd section, "And be it further enacted, that from and after the passing of this Act, no person in Ireland, who shall be duly licensed under any Act or Acts for granting excise licenses to deal in or sell coffee, tea, cocoa nuts, chocolate or pepper, nor any person deemed a grocer within the meaning of the laws of the excise in force in Ireland, at or immediately before the passing of this Act, shall be entitled to take out any license to retail spirits in the house or on the premises of such retailer, or in any house or on any premises within one quarter of a mile of the house or premises of such retailer, other than a license to retail spirits in quantities not less than one pint, and to be consumed elsewhere than in the house or on the premises of such retailer; and any license to retail spirits in any *other manner*, granted after the passing of this Act to any such grocer or person so licensed as aforesaid, shall be wholly null and void."

Now, it is conceded that that is a clear and distinct repeal of the permission given by the 6 G. 4; a distinct repeal of the power given to grocers by that former Act. By the former Act, a grocer was to get the license prescribed by that Act: there cannot be any question about that, but this Act, I take it, gives a new title, and he is as much entitled

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to the license mentioned in this, as he was to the license under the 6 G. 4. We must, I think, necessarily give this section this reading; we must take it as if it were divided into two sections—"And be it further enacted, that from and after the passing of this Act, no person in Ireland, who shall be duly licensed under any Acts for granting excise licenses to deal in or sell coffee, tea, &c., shall not be entitled to take out any license to retail spirits in the house or on the premises of such retailer, or in any house or on any premises within one quarter of a mile of the house or premises of such retailer, other than a license to retail spirits in quantities of not less at one time than one pint, and to be consumed elsewhere;"—and as if there then followed a 4th section—"But be it enacted that he shall be entitled to a license to sell spirits in quantities of not less at one time than one pint, and to be consumed elsewhere than on any such premises."

Now, the difference between these licenses is very obvious and may be most important and injurious in its effects on the business in question. This latter Act limits the grocer in regard to the premises. Before the Act passed, he could have got a license for premises situate at a less distance than within a quarter of a mile of the house in which he carried on his grocery business; and if he kept a public house, he might have got an ordinary retailer's license, and he might sell in any quantity however minute; but this Act does away with that privilege. By the 6 G. 4, he could not sell more at one time than two quarts, but he could sell any quantity under that compliment; and he was not restricted as to distance: but by this Act, that system has been entirely done away with and a new one introduced, both with reference to the manner of carrying on trade, and the thing to which he was declared entitled by the 6 G. 4.

Now, the high rate of duty having been imposed by the 6 G. 4, and this last Act declaring that he shall not be entitled to the same description of license as granted under that Act, but to a different license; can we, without clear words, say, that he is to pay the same rate of duty for a different license? The law has not said so in express terms; and are we, therefore, in the silence of the law upon the subject, to declare it affirmatively? Or can it be fairly said, as a matter free from any reasonable doubt, that it was not the intention of the Legislature to have repealed the higher rate of duty? Who can say that they intended the greater license duty should continue to be paid? and if they so intended that, why would they not have expressed themselves in clear and positive language, thereby removing all doubts upon the matter?

There may, no doubt, be good reason for saying that these details may have been designed as descriptive merely of the regulations to affect the general thing called "a grocer's retail license;" but I find no general thing called "a grocer's retail license,"—I find on the contrary what I

conceive to have been, under the 6 G. 4, c. 81, a special license with a particular rate of duty annexed to it. I find that special license prohibited and repealed and a new license substituted in its place. Therefore, without drawing inferences, which I cannot do, I do not think that it was the intention of the Legislature to impose upon this license the higher rate of duty; if it was their intention, they ought to have expressed it: they have not done so, and it is not within the province of the Court, or consistent with the decided authorities, to rely upon inferences in order to impose a burthen upon the subject. Let those whose duty it is to see that the excise laws are properly administered, go to the Legislature, and get them to express their intention in plain language so as to remove all doubt and ambiguity.

On the whole of the case, therefore, I do think that the former license has been repealed; that there is no license but this new license; that there is no high rate of duty specially imposed upon it; and that, therefore, as to duty it can only be charged as coming under the head of licenses granted to the general class described in the 6 G. 4, c. 81, by the words, "every retailer of spirits." The value of the plaintiff's house, according to the special verdict, was £36; therefore, the duty upon his license, as an unexcepted retailer, should be £8. 8s.

The penalty has been referred to without shaking my judgment. It has been said that a penalty could not be sued for on this clause; now, I see nothing to prevent the penalty from being enforced. The words of the clause are plain enough. Every retailer of spirits in Ireland, if he sells spirits without a license, is liable to a penalty; if a general retailer, he is liable to pay £50; if a retailer licensed as a grocer, &c., he is to pay £100.

On the whole of the case, my opinion is, that judgment ought to be given in favour of the plaintiff, but the majority of the Court being of a different opinion, the judgment must be entered for the defendant.

Judgment for the defendant.*

* Reversed on writ of error, *vide post*, 107.

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Exchequer Chamber.

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(*In Error from the Court of Exchequer.*)

The effect of the 6 & 7 W. 4, c. 38, s. 3, is that a licensed publican is not entitled to a grocer's license for the sale of coffee, tea, &c., on the same premises; and a person holding a grocer's license is not entitled to any other license for the sale of spirits, but that mentioned in the 6 & 7 W. 4, c. 38, s. 3.

THIS was an action of trespass on the case, brought by the plaintiff against the defendant, who was a collector of excise, for having refused to grant him a certain license to retail spirits. The declaration alleged that the plaintiff heretofore, to wit, &c., was and thence hitherto hath been a person duly licensed, pursuant to the statutable enactments in that case made and provided, to exercise and carry on, and then and there did exercise and carry on, the trade and business of a retailer of spirits, to be drunk or consumed in his house on the premises, to wit, &c.; and being so licensed, he then and there became, and was desirous, and intended, to trade and sell coffee, tea, cocoa nuts, chocolate and pepper in a certain room situate in and belonging to the said last-mentioned house, and situate within the Dublin excise district; and for that purpose, duly made entry of said room with the proper officer of excise, in whose survey said room was situated, and was intended to be so used. The declaration then averred, that the defendant on the day and year last aforesaid, &c., was the collector of excise for the said Dublin district, and a person employed by the Commissioners of Excise of our said Lady the Queen, for the purpose of granting within the said excise district, under his hand and seal, excise licenses authorised or required to be taken out by persons carrying on any trade or business under or subject to the laws of excise, in and by the statutes in that case made and provided; and the said plaintiff being so licensed as aforesaid to retail spirits, and having for the purpose of trading in and selling coffee, tea, cocoa nuts, chocolate and pepper, in the room aforesaid, duly made entry of said room in manner aforesaid; and being otherwise entitled to receive such license as hereafter next mentioned, afterwards, then and there applied to the said defendant, as such collector and person employed by said Commissioners of Excise for the purpose aforesaid, for a license to trade in and sell coffee, tea, cocoa nuts, chocolate and pepper in the said room so situated as aforesaid, and whereof entry had been made in manner aforesaid, such license as last aforesaid being authorised and required by law to be taken out by every person trading in the said commodities; and the said plaintiff then and there paid to the said defendant, as such collector as aforesaid, a certain sum of money, to wit, 11s. 6½d., being

the amount of duty or sum of money legally imposed upon such license, and requested and demanded from the defendant, that he would grant and deliver to him the said plaintiff such license to trade and sell coffee, tea, cocoa nuts, chocolate and pepper, as aforesaid. The declaration then averred, that it was the duty of the defendant as such collector of excise, and person so employed by her Majesty's Commissioners of Excise, for the purpose of granting within the said Dublin district, under his hand and seal, excise licenses, authorised or required to be taken out by persons carrying on any trade or business under or subject to the laws of excise as aforesaid, and under, and by virtue, and in pursuance, of the statute, &c., so to grant and deliver to him the plaintiff, being a person legally entitled as aforesaid to receive the same, and having paid the sum of money or duty thereupon imposed by law as aforesaid, such license to trade in and sell coffee, tea, cocoa nuts, chocolate and pepper, as aforesaid; yet that the defendant, not regarding his duty in that behalf, as collector of excise, did not then, or at any time afterwards, grant or deliver to the said plaintiff such license, but wholly declined so to do; whereby the plaintiff was prevented carrying on said trade or business of selling coffee, tea, cocoa nuts, chocolate and pepper, and lost and was deprived of divers gains and profits, &c., to the damage of the said plaintiff, &c.

To this declaration, the defendant filed a general demurrer; and the plaintiff having joined in demurrer, the Court of Exchequer gave judgment for the defendant *pro formâ*, without hearing the case argued, in conformity with the judgment of the Court of Queen's Bench in the case of *Boland v. The Commissioners of Excise* (a), where the same question was raised; and as both parties were desirous of taking the opinion of the Court of Exchequer Chamber on the point. Accordingly, a writ of error having been taken out by the plaintiff, and the common errors assigned, to which the defendant filed a joinder, the case now came on for hearing.

Mr. B. Stephens, and Mr. Napier, Q. C., with whom was Sir Colman O'Loughlen, Bart., for the plaintiff in error.

The question in this case arises on the construction of the* 6 & 7 W. 4, c. 38, which was an Act passed to amend the previous Act of the 3 & 4 W. 4, c. 68, as to licenses. The 3rd section enacts, that "No person in Ireland who shall be licensed to sell coffee, tea, &c., nor any person deemed a grocer within the meaning of the excise laws in force in Ireland, at or immediately before the passing of this Act, shall be enti-

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(a) 2 Ir. Law Rec. 287; S. C. 2 J. & S. 243.

* *Vide ante*, p. 77, *note*.

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"tled to take out any license to retail spirits in the house, or on the premises, of such retailer, or in any house, or on any premises within one quarter of a mile of the house or premises of such retailer, other than a license to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than in the house, or on the premises, of such retailer; and every license to retail spirits in any other manner, granted after the passing of this Act, to any, save a grocer or person so licensed as aforesaid, shall be null and void." The plaintiff is stated in the declaration to have been a licensed publican—that is, a person licensed to retail spirits to be consumed on the premises; and being so licensed, applied to the collector of excise for a grocer's license to sell coffee, tea, &c.; which license the collector is, by the 6th section of the 6 G. 4, c. 81, required to grant to any person legally entitled to receive the same, on payment of the duty. This latter license the collector refused; and the question for the Court is, was the collector justified in such refusal; or, in other words, was the plaintiff disentitled by law from receiving the license? It is admitted, that any person in the community would *primâ facie* be entitled to the license to sell tea, &c.; but it is insisted, that the effect of the above section is to create an exception with regard to publicans.

At common law, the subject might, of common right, engage in any lawful trade, without any license or permission from the Crown, or in several trades, at one and the same time; and such being the common law right, certain statutes were passed from time to time restricting that right. With respect to publicans, they rendered the sanction of magistrates necessary, and every person was *primâ facie* entitled to apply to the magistrates for a general retail license, except so far as they were disabled by statute; but there never was any restriction or disability as to the tea license. Accordingly, it lies on the defendant to show some statutable disqualification preventing the plaintiff in this case exercising the trade of a grocer; and this, they say, is done by the foregoing statute 6 & 7 W. 4, c. 38, s. 3. But there is nothing in that enactment which expressly disqualifies a publican from getting a tea license; nor, as we contend, a tea dealer, or grocer, from getting a publican's license. That section, as we insist, relating exclusively to the peculiar license which had always existed in Ireland, called "the spirit grocer's license," and not referring, or intending to refer, to the publican's license at all. The other side must contend that the disqualification is cast on the plaintiff by implication, and not by direct enactment. But even if that appeared with a high degree of probability, we say such is not sufficient to control or take away a common law right. Whether the 3rd section of the 6 & 7 W. 4, c. 38, and particularly the concluding words of it, are to be taken in their abstract literality, or in connection with former enactments, must depend

on the state of the law at the time the Act passed;—and that we shall proceed to consider.

Previous to the 45 *G. 3*, c. 50, all the Acts relating to this subject were annual, and the retail or publican's license was confined to victuallers, coffee-sellers, &c.; and as that Act repeals all the former Acts, it is a good *terminus a quo* to investigate the state of the statute law on the subject. The 19th section is the first, and was at that time the sole disabling enactment, and disqualifies, amongst other particularly specified classes, "grocers;" and if that has not been repealed, we admit that we cannot succeed in this action. This disabling clause was repealed by the 46 *G. 3*, c. 70, which having been, in its turn, repealed by the 47 *G. 3*, sess. 2, c. 12, the disability of the grocer was revived; but the 14th section of this latter statute gives him a special retail license, since commonly called "the spirit grocer's license," which exists at this day, and is now only grantable under that very 3rd section of 6 & 7 *W. 4*. This was the first statute which enabled grocers to sell spirits: they were prohibited by the 19th section of the 45 *G. 3*, c. 50, from getting a publican's license; but this Act gave them a spirit license *sui generis*; and the law continued unchanged until the 58 *G. 3*, c. 57. At the time of passing this latter Act (58 *G. 3* c. 57), the grocer might obtain the special retail license under the former Act (47 *G. 3*), but was disabled from obtaining the publican's license; and this statute (58 *G. 3*) after reciting the disabling enactment (45 *G. 3*, c. 50 s. 19), repeals it so far as it applies to grocers; which had obviously the effect of restoring him to his common law capacity to apply for a publican's general retail license, subject, of course, to the statuteable restrictions applicable thereto; a right which he ever since continued to exercise, until after the passing of the 6 & 7 *W. 4*, when it was first questioned by the excise. The 2nd section contains what may be termed the second enabling clause, and extended the privilege of a grocer both as to the quantity he might sell, and the place in which he might retail spirits; such spirits however, under *that special* license, not to be consumed on the premises, a condition which was always annexed to the spirit grocer's license. Thus, under this Act, the grocer had two rights; first, his common law right to apply for a publican's general retail license, with its restrictions; and second, his statuteable right to apply for a grocer's special retail license with its privileges; and it cannot be contended that this latter took away the former, because a common law right cannot be taken away by affirmative words. The next statute on the subject is the* 6 *G. 4*, c. 81, which is an Act of the United Kingdom; and that it takes away no right from the grocer in this country must be conceded; because it is not pretended that the British grocer's right to get a publican's license has been, or could be, interfered with. The 3 & 4 *W. 4*, c. 68 followed; and the

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13th section adopts the disabling language of the 19th section of the 45 G. 3, c. 50, merely omitting some trades, and inserting others, and the word "grocer" is not to be found in it; which shows that it was not intended that he should be included in the category of disqualified persons. There is, therefore, no disqualification in that statute, or in any other, up to the 6 & 7 W. 4, c. 38, s. 3; and it appears to us, that if a grocer might sell spirits to be consumed on the premises, under the publican's license, when sanctioned by the magistrates, as well as spirits to be consumed elsewhere under his own special license, without any such sanction or other restriction up to the passing of that Act, he may do so still, there being no language therein which expressly meets the circumstances of this case, and the section being plainly applicable to this special license only; the negative words being introduced solely for the purpose of giving increased efficacy to the enactment. To take away a common law right, the language must be express and unambiguous; *Hubbard v. Johnson (a)*. The sole object appears to have been, instead of granting the grocer a license to sell in any quantities not exceeding two quarts, to prevent him selling in quantities less than a pint; which was intended as a protection, as well for the revenue, as the mere publican, who was injured by the sale and consumption of small quantities in the establishments of grocers, who did not take out the publican's license, and thus evaded the law: but there is nothing to prevent the grocer getting any license which he could have got before; and consequently, he has a right to hold a publican's license, if he chooses to submit his premises to the surveillance of the police, and the other restrictions imposed by statute on persons taking out that description of license. As to the concluding words of the 3rd section of the 6 & 7 W. 4, c. 38, annulling and avoiding every other license save that before specified, they must be restrained by the context, and do not prevent a party taking out any license, except a special retail license differing in its terms from that specified in that enactment.

Lastly, we contend that, even supposing the effect of the clause to be to prevent the holder of a grocer's license from taking out a publican's license, he has manifestly a choice, and is not concluded by his first election; but having first taken out a publican's license, he may lawfully take out the tea, or grocer's license; the consequence of which would be the former license becomes *ipso facto* void: but with that conclusion of law the collector has nothing to do. It does not appear on the declaration, that we had any intention of carrying on both trades concurrently on the same premises; and the Court are not to presume illegality. If their construction be correct, the publican's license became null and void the moment the other was granted, and if, after that, we carried on both trades, we were liable to penalties; *Milwood v. Thatcher (b)*.

(a) 3 Taunt. 220.

(b) 2 T. R. 81.

The *Solicitor-General*, with whom were Mr. *Bennett*, Q. C., and Mr. *Jebb*, contra. H. T. 1845.
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With respect to the last point, there is in this declaration, an averment of an existing trade, viz., that of a retailer of spirits, to be consumed on the premises; and on the common principle of law, the continuance of anything is to be presumed, unless the contrary is stated; 1 *Phil. on Evidence*, 449 (last edition). The case made is, that being licensed to carry on the spirit trade, the plaintiff was entitled to get the grocer's tea license; so that the question raised is, as to the right to have the two licenses, not to carry on the two trades at the same time; and this raises the very question on the 3rd section of the 6 & 7 W. 4, c. 38, whether it is the duty of the officer to allow a party to have both together, and to give him the means of committing a breach of the law? Now, the meaning of the Act is, that the same person shall not hold, at one and the same time, both the grocer's and the publican's license; but the plaintiff here seeks to evade the law, by first taking out the publican's license, and then applying for the grocer's tea license. One principle has been held in view in all the statutes which have been passed on the subject; and that is, that grocers should not have an opportunity of selling spirits in small quantities to be consumed on the premises, and to prevent grocers' premises from becoming publicans' premises, without the safeguards which are peculiarly applicable to the latter. The 6 & 7 W. 4, c. 38, is an amendment of an Act (3 & 4 W. 4, c. 68), which was an amendment of the 6 G. 4, c. 81; and which latter Act was the first of the modern code on the subject; and in construing those Acts (especially the 6 G. 4, c. 81, which is an Act of the United Kingdom), it is necessary to keep in view the state of the previous law in Ireland, and to recollect that the term "grocer" is a phrase peculiar to the Irish Acts, and which will account for the difference in practice which prevails between this country and England, in this respect. The 6 & 7 W. 4, c. 38, s. 3, has two objects; one of them is, to prevent persons licensed to sell coffee, tea, &c., from obtaining a publican's license; and the other is, to restrict the form of the spirit license which the collector is entitled to issue to such persons: and the Court has to decide, whether the prohibition is to be nullified, by permitting a party to take out a publican's license first, and then to apply for the grocer's license. The permission of such a practice would be a repeal of the enactment; and it cannot be maintained that the defendant, in refusing to permit so manifest a violation of the provisions of an Act of Parliament, has been guilty of a breach of his duty as collector of excise.

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PENNEFATHER, C. J.

Feb. 6.

In this case, in which John M'Kenna is the plaintiff, and George Pape, collector of excise, is the defendant, the Court are unanimously of opinion, that the judgment of the Court below ought to be affirmed. I will

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The present is an action of trespass on the case, and a demurrer having been taken to the declaration, the Court below gave judgment in favour of the demurrer. I will state shortly the nature of the action and the declaration:—It was an action against Mr. Pape, a public officer, for a wrong alleged to have been done by him in the execution of his duty as collector of excise; and it is somewhat remarkable, that in no part of the declaration is the act of this defendant, whose conduct is the subject of complaint, alleged to have been done maliciously, or with an improper motive. I do not mean to give an opinion as to whether that omission, or the absence of an averment of that description, might, or might not, furnish a reason against the maintenance of this action at all; that is to say, whether an action can be maintained against a public officer acting in the execution of his duty, without any imputation of malice or improper motives. That question I shall pass by, because the Court proceeds to judgment on other principles, viz., that the subject of complaint is that, of which the plaintiff has no right to complain. The defendant complains in his declaration against Mr. Pape, for having refused him that which he states himself to have been by law entitled to; but which the Court considers he was not entitled to; and therefore it is, that I say he has no ground of complaint.—[Here his Lordship stated the declaration.]

Thus the plaintiff sets out his demand for the license, which he insists it was the duty of the defendant to grant to him; and he then states the defendant's refusal to grant it, by reason of which he was prevented from engaging in, and carrying on, the said trade or business. Now, neither there, nor in the other parts of the declaration, is there an averment that the plaintiff on getting such license as that applied for, at all intended to discontinue the spirit retail trade which he carried on under his former license; and there is reason to infer, from the absence of such an averment, that that which exists is likely to continue. There is every reason to suppose, without an averment to the contrary, that the plaintiff's object in applying for the second license, was to carry on the two trades of spirit retailer and grocer, at one and the same time and place. He then avers, as I have already stated, that it was the duty of the defendant, pursuant to the statute, to grant and give to him, the plaintiff, being legally entitled thereto, having paid the duty imposed by law thereon, such license to trade in and vend coffee, tea, &c.; and it then avers, that the defendant did not, and would not on such request, grant or give to the plaintiff such license, but wholly refused and declined so to do. That is the first count in the declaration, without any averment that he does not intend, and did not intend, to carry on the two trades concurrently. But the fact that he did so intend, being rather to be collected from his declaration, the question is, was Mr. Pape, by

virtue of his office as collector, and the proper distributor of excise licenses, bound to give to the plaintiff that license; or has the plaintiff made out that case? for it lies on him to establish the whole of it, in order to entitle him to judgment against a public officer for the violation of his duty. Nor does the Court see much reason to sustain the plaintiff in his view of the law, by reason of the provision contained in the 6 & 7 *W. 4*, c. 38, s. 3, which has been already so often referred to.—[Here his Lordship read the 3rd section of 6 & 7 *W. 4*, c. 38].

Now, it is very plain, that the license applied for was a license falling within, either the words, the policy, or the spirit of this Act of Parliament; and that the plaintiff is seeking by means of this action to enforce that which the language and policy of the law prohibits. He has brought an action against a public officer for doing that which was his duty. If this plaintiff had been a grocer at the time he made this application, and had applied for a general retail spirit license, that application would have been directly in the teeth of the Act of Parliament. But it is said, that the plaintiff not having been a grocer at the time of the application in question, but only a retailer of spirits, he does not fall within the express words of the statute, and is entitled to that which he sought. The Court, however, are of opinion—and they are warranted in that opinion, not only from the consideration of the statute in question, but also from the circumstances of the same question having been argued before another Court, and judgment given thereon,—that it is against the policy of the law, that that should be done indirectly, which it will not permit to be done directly. They consider that the policy of this Act is to prevent the carrying on concurrently by one and the same person, and in one and the same place, these two trades. The policy of the law is equally broken, whether a party takes out a publican's license first, and then the grocer's; or whether he take out the grocer's license first, and then the publican's. The policy of the law being, as I have stated it, to prevent the two trades being carried on concurrently, it is to be supposed that the law is somewhat stronger than to permit its object being defeated by a mere departure from its language.

Now, this very question came before the Court of Queen's Bench in the year 1840, in the case of *Boland v. The Commissioners of Excise*, when Chief Justice Bushe took the matter into his immediate consideration, and delivered a well considered judgment on it. After stating the facts of the case, and 3rd section of the Act in question, Chief Justice Bushe thus proceeds:—"Upon argument, the Counsel for the prosecutrix suggested, that although that section may prohibit the granting of a publican's license to a grocer, it does not prohibit the granting of a grocer's license to a publican; but that argument was afterwards abandoned, and rightly, because by an adoption of that construction, we should altogether defeat the object of the Legislature;

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“for if a publican is entitled to take out a grocer's license, he is entitled to hold both licenses concurrently; and then the enactment would amount to this only, that in order to carry on both licenses, and to carry on both trades together, it is only necessary to take out the publican's license before he takes out a grocer's license; whereas the plain object of the Legislature was to prevent grocers retailing spirits on the same premises in which they sold their groceries—a practice which was found to be attended by pernicious consequences. Again, it was contended that under, or rather, notwithstanding the clause, the grocer is still entitled to take out a publican's license. But we cannot adopt that construction, for the statute says, that ‘No person deemed a grocer within the meaning of the excise laws in Ireland shall be entitled to take out any license to retail spirits on the premises, other than a license to retail spirits in quantities not less than a pint, and to be consumed elsewhere than on the premises; *any license* to retail spirits in any other manner, to any such grocer or person so licensed as aforesaid, shall be null and void.’ If the intention had been by this clause, to declare that no person being a grocer should thenceforward be entitled to take out a publican's license, it is hard to conceive in what words more clear or more strong that intention would be expressed.” Then, after noticing the distinction drawn by the plaintiff's Counsel between the two classes of licenses, viz., the grocer's and the retailer's spirit license, and their conclusion that it was only licenses of the latter class which, by the last Act, grocers were debarred from taking out, Chief Justice Bushe thus proceeds:—“But even if there exists such a distinction among licenses as is assumed (which we are far from deciding), the language of the 6 & 7 W. 4, c. 38, s. 3, is too strong and too clear to allow us to admit the conclusion drawn from these premises. The plain meaning of that enactment is this—it refuses to the grocer *any* license to retail spirits other than such as is described in *that* statute, and makes any other, if granted, null and void.”

That was a well considered judgment of the Court of Queen's Bench, and it accords with the view I take of the statute before us. It does not matter which of the two trades is exercised first, the law being violated in the circumstance of their being carried on together. I might go further into the law of the case; but what I have stated and read on the subject is sufficient to show the grounds of the opinion of this Court, that the judgment of the Court below should be affirmed with costs.

Judgment affirmed.

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Exchequer Chamber.

STEPHEN FOX DICKSON in Error v. GEORGE PAPE.

(In Error from the Court of Exchequer.)

Feb. 5.

THIS case came before this Court on a writ of error brought by the plaintiff in error, who was also plaintiff below, to reverse a judgment of the Court of Exchequer on a special verdict. The facts and circumstances of the case will be found reported *ante*, p. 74.

Mr. Benjamin Stephens and Mr. Napier, Q. C., with whom was Sir Colman O'Loughlen, Bart., for the plaintiff.

The question raised on this record is, whether the plaintiff, who is a licensed grocer, is liable to pay for the licence to retail spirits which is specified in the 3rd section of the* 6 & 7 W. 4, c. 38, the higher rate of duty which was imposed by the schedule to the† 6 G. 4, c. 81, on a grocer taking out the spirit license specified in that Act; or to the lower rate of duty imposed by the same schedule on all general spirit retail licenses? It might be contended, that where the enactment giving the particular license is silent as to the duty, no duty is payable at all; but we are willing to admit, that the license in question is liable to the same duty as that imposed on the publican's license, but to no more. Under the 6 G. 4, c. 81, the grocer was entitled to a license to sell in any quantity not exceeding two quarts; but by the 6 & 7 W. 4, c. 38, s. 3, he is not permitted to sell any quantity less than a pint. This last enactment has, besides an affirmative operation of granting the license in another form, a negative operation also—viz., to repeal any privilege granted theretofore (including the license specified in the 6 G. 4), and to annul every form of license other than that specified in this section—viz., to sell in quantities not less than a pint, &c., which is obviously a less beneficial license to the grocer than the former. By reference to the 6 G. 4, c. 81, s. 4, it will be seen that the duty there imposed was a duty commensurate with the character and extent of the license grantable under that section, and was in exact proportion to the privileges it conferred; and if this license has been annulled by the subsequent enactment, the

The higher duty imposed on grocers taking out spirit licenses by the schedule to the 6 G. 4, c. 81, s. 2, is not the duty chargeable on the license specified in the 6 & 7 W. 4, c. 38, s. 3; and therefore when the collector of excise refused to grant such a license to a duly licensed grocer, without payment of the said higher duty imposed by the 6 G. 4, which was accordingly paid under protest; *Held*, reversing the decision of the Court of Exchequer, that the grocer could maintain an action against the collector for the difference between the said rate of duty and the duty imposed on publicans' retail spirit licenses by the same Act of 6 G. 4, c. 81.

Dissentientibus

bus LEFROY, B., RICHARDS, B., TORRENS, J., and PENNEFATHER, B.†

* *Vide ante*, p. 77.

† *Vide ante*, p. 75.

‡ *Absentibus* BURTON, J. and CRAMPTON, J.

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duty that accompanied it has been also annulled; and it would be absurd and unjust to apply it by implication to another, and less valuable, license. It was contended below, that the late enactment does not operate as a total repeal of the provisions on the same subject contained in the 6 *G.* 4, c. 81, but as a modification only of the manner in which the privilege is to be exercised, leaving the duty unaltered. But we say, that the duty is imposed expressly on the license, and is not a personal duty imposed on a particular class of trades, as such. At all events, if there is any doubt on the matter, these being Acts which impose duties on traders, are to be construed in favour of the subject. As to the construction that would incorporate the provisions of the 3rd section of the 6 & 7 *W.* 4, c. 38, with the schedule of the 6 *G.* 4, so as to read them together, the utmost extent to which the rule of reading statutes *in pari materiâ* together has gone, is, that the provisions of unrepealed statutes are to be taken into consideration, but not of repealed statutes, when reading another which repeals it—the former having become as if it never had existed: *Stevenson v. Oliver* (a); *Dwarris*, 701. It is for the Crown to show that the plaintiff comes clearly within the exception contained in the schedule to the 6 *G.* 4; and this must be done by plain, intelligible, and unambiguous language; for as Lord Eldon has observed, “a man is not to be reasoned into a penalty.” On this subject, the observations of Lord Wynford, in the case of *The King v. Winstanley* (b), which have been adopted by Baron Foster in *The Attorney-General v. Dunn* (c), are in point:—“In all revenue cases, let the officers of “Government take care that the Legislature is made to speak plain and “intelligible language. If the Legislature is not made to speak plain and “intelligible language, let not individuals suffer, but let the public. I am “bound to say, if there is any doubt about these words, the benefit of “that doubt should be given to the subject.”

Mr. *Jebb* and Mr. *Bennett*, Q. C., with whom were *The Solicitor-General* and Mr. *Tomb*, Q. C., *contra*.

We contend, on the part of the defendant, that the plaintiff is bound to pay the higher rate of duty mentioned in the clause of the schedule to the 6 *G.* 4, c. 2.

It is for the Court to decide, whether such a construction not only can, but must, not be given to the 6 *G.* 4, and 6 & 7 *W.* 4, c. 38, s. 3, that both of them may have effect. The plaintiff insists, not that there is any express repeal of the former statute, but that there is a repeal by implication; and that without being able to bring in aid any intention of the Legislature to make such repeal. The question, therefore is, not whether

(a) 8 M. & W. 241.

(b) 1 Cro. & Jer. 441.

(c) 1 Ir. Law Rep. 363.

a duty clearly imposed by an unrepealed Act is to be imposed upon the subject by implication; but whether a duty clearly imposed by an unrepealed Act is to be so taken away? The 6 G. 4 commences by saying, that certain duties shall be paid in Great Britain and Ireland (s. 2): those duties are the duties mentioned in the schedule to section 2, where there is an exception with respect to grocers, or where a certain restriction is imposed; and it is under that restriction alone, that a grocer is entitled to any spirit license whatever. The plaintiff here cannot get it as a general retailer of spirits; first, because he is excepted by the first clause in the schedule as being a grocer; and secondly, because he does not appear on the record to have performed the necessary requisites, under the 13th section of the 6 G. 4, c. 81, and the 2nd section of the 3 & 4 W. 4, c. 68, of obtaining a certificate from the magistrates, &c. The only right he has to it is under the exception in the schedule to the 6 G. 4; and the condition annexed is, that he pays the higher duty, which is also clear from the 4th section. We are next to consider the 6 & 7 W. 4, c. 38, which was an Act to amend an Act (3 & 4 W. 4, c. 68), which amended the 6 G. 4, c. 81. That latter Act, therefore, and the two amending Acts, are to be considered as one code; and as there is not a word about repealing either of the former Acts, the Court is, if possible, to give effect to all the provisions of each of them: *Dwarris*, 699; *Foster's case* (a); *Duck v. Addington* (b); *Davies v. Edmundson* (c); *Attorney-General v. Lockwood* (d). The 6 & 7 W. 4, c. 38, contains no expression from which it can be inferred, that the Legislature was governed by any intention or policy different from that which dictated the former Acts of the 6 G. 4, c. 81. On the contrary, it plainly appears that it proceeded in the assumption, that it was necessary for a grocer to take out a grocer's spirit license (which could only be on the terms prescribed by the 6 G. 4, c. 81), before he could retail spirits; for it does not expressly give grocers a right to any license whatever, but merely interdicts any form of license except that mentioned in the section. We must, therefore, have recourse to the 6 G. 4, c. 81, s. 4, which says that grocers shall be entitled to take out the license therein-before mentioned; that is to say, a license subject to the condition of paying a higher duty than that for the publican's license. This capacity of grocers to take out a license was accompanied by certain restrictions; but it must be remembered that it was also accompanied by certain privileges—viz., by an exemption from applying to the magistrates in the first instance, and producing the certificate prescribed by the 3 & 4 W. 4, c. 68, s. 5. This privilege still remains; but one of the restrictions (i. e., the not selling more than two quarts) has been removed, and another regulation substituted. In other words, the terms on which

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(a) 11 Co. 556.

(b) 4 T. R. 447.

(c) 3 B. & P. 387.

(d) 9 M. & W. 378, 399.

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the grocer gets his license remain the same, but the matters to be done under the license are altered to a certain extent. As the plaintiff, therefore, cannot get the ordinary publican's license, he can only get the grocer's license, which he must take *cum onere*. If he seeks the benefit, he must submit to the restriction; and whether the restriction substituted by the latter Act be more prejudicial than the former one or not, is a matter of which the Court cannot judge, and which cannot affect the legal construction of these Acts of Parliament. Again, we contend, that the words of the restriction in the 6 G. 4 are no part of the description of a grocer, but a mere regulation, such as was imposed from time to time by the Legislature; and this appears from the 26th section of the same Act, which imposes a higher penalty on the grocer selling spirits without license than on the publican, and distinctly marks out the distinction between the two classes. If then, he takes out the license *as a grocer*, he must pay the duty imposed on licenses taken out by persons filling the character; and that duty will be found in the schedule to the 6 G. 4, and no where else. By our construction of these statutes, every part of them will have effect given to it, and the whole code will remain consistent and harmonious in its several parts and provisions. The evident intention will be carried into effect; no repeal will be necessary, and the Crown will not be deprived by implication of a duty clearly imposed by an unrepealed Act. If a contrary construction be given, the evident intention will be violated, and a repeal must be implied, for the purpose, either of depriving the Crown of duty altogether, or of imposing a rate of duty which is applicable to a kind of license which the grocer cannot have. The obvious meaning and effect of the statutes is, to give two distinct licenses to two distinct classes of traders, publicans and grocers. The 6 G. 4 grants the licenses to the latter class to a certain extent, and the 6 & 7 W. 4 qualifies this, by granting the license to the *same class* to a lesser extent; but the two classes remain as distinct as ever; and the duty must be payable under the 6 G. 4, by the plaintiff as a member of one or other of these two classes, all former license duties having been repealed. The case of *Boland v. The Commissioners of Excise* (a) shows that the plaintiff cannot have a publican's license; nor, even if he could, has he in this record shown that he has qualified by taking the preliminary steps. The only alternative is, that he should have the grocer's license under the 6 G. 4. that is to say, the license subject to the higher rate of duty.

JACKSON, J.

This case of *Dickson v. Pape* comes before this Court on a writ of error, brought by the plaintiff to reverse the judgment of the Court of Exchequer, which was pronounced on a special verdict. I shall very

(a) 2 Ir. Law Rep. 287; S. C. 2 J. & S. 243; et vide *M'Kenna v. Pape*, ante, p. 98.

shortly state the heads of that special verdict.—[Here his Lordship stated the special verdict.]

This case has been most fully and ably discussed in this Court, and most carefully considered by the Judges; and unquestionably it is a case the decision of which involves much difficulty. That difficulty, as it appears to me, has arisen from the manner in which the legislation on the subject has been conducted, the statutes bearing upon it not having been prepared by the same class of public servants. One of them, the 6 G. 4, c. 81 is, on its face, a fiscal Act, properly so called; it repeals the former duties, and imposes new duties on the traders in exciseable articles. The subsequent Act referred to in this discussion, viz., the 6 & 7 W. 4, c. 38, is not properly a fiscal statute; it certainly amends the 6 G. 4, c. 81; but not emanating from the same public department, I apprehend it was not considered with the care necessary to preserve the uniformity and consistency of legislation on the subject. Here it is difficult to ascertain, on the fiscal view, what was the intention and meaning of the Legislature in passing it; and hence arises the difficulty which the Court has experienced in coming to a conclusion on the case depending now before us.

It has become my duty, in consequence of the difference of opinion existing in the Court (the Judges being equally divided*), to state mine in the first instance; and I shall, therefore, proceed to state it, and the reasons which have influenced my mind, as to what the decision of the Court ought to be.

The question for the Court to determine is this,—Whether the plaintiff is liable to pay the higher, or the lower, amount of duty specified in the schedule contained in the Act of 6 G. 4, c. 81? In other words, whether he is to pay £12. 2s. 6½d., or £8. 16s. 6d. for a spirit grocer's spirit license? That statute, and the schedule therein, divides retail traders in spirits into two classes, and applies to the license grantable to each of them a graduated scale of duty. Now, the scale of duty applicable to a trader coming within the class mentioned in the exceptions would be £12. 2s. 6½d. having regard to the value of his premises; and the scale of duty applicable to the other class of traders, not within the exception, would be £8. 16s. 6d., still having regard to the value of his premises; that is to say, if the plaintiff here falls within the exception, he would be liable to the higher rate of duty; if not, he would be liable to the lower rate, which is, as I conceive, applicable to all other retailers of spirits in Ireland save those described in the exception. The question then is, does he come within the exception? Now, this depends on the true construction of the 6 G. 4, c. 81., in the consideration of which it will be necessary to pay attention to the Act of the 6 & 7 W. 4, c. 38.

* BALL, J., changed his opinion while the Bench were delivering their judgment, *vide post*, p. 122.

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The 6 G. 4, c. 81, is an Act passed to repeal various excise duties, and to impose others in lieu thereof; and the 2nd section, with the schedule contained in it, which imposes the duties on retailers of spirits in Ireland, enacts,—“That from and after the 5th day of July 1825, in “lieu and instead of the duties by this Act repealed, there shall be “raised, levied, collected, and paid unto his Majesty, his heirs and “successors, in and throughout the United Kingdom of Great Britain “and Ireland, the several duties of excise, or rates and sums of money “hereinafter following, that is to say,” &c.; and then it specifies the rates. Now, it appears obvious that it is on the license the duty is imposed; for in the very next paragraph are these words: “*For and upon every “excise license* taken out by any maker, manufacturer, trader, dealer, “retailer, or person hereinafter mentioned, to be paid by such maker, “&c., the respective annual sum or duty of excise in English currency “hereinafter mentioned, that is to say,” &c. It specifies a variety of persons who are to be liable to new duties; and then comes on to “every “retailer of spirits, except retailers of spirits in Ireland after mentioned;” and there it applies itself to that class, that is, “all retailers of spirits not within the exception,” and imposes a scale of duty graduating according to the value of the premises; and £8. 16s. 6d., it is, I think, rightly argued, applies to the plaintiff in this case. After giving the graduated scale by which that class is to be regulated, the statute goes on, and says,—“every retailer of spirits in Ireland, being duly licensed to trade in, “vend, and sell coffee, tea, &c., and not selling spirits in any greater “quantity at one time than two quarts, or any spirits to be consumed in “the house, or on the premises of such retailer, &c., if the premises “occupied by such retailer be rated at a yearly rent of £25 or under “£9.” It then goes on and gives a graduated scale of duty for that class who are within the exception.

Now, this is the only Act which professes to impose a duty upon the retailers of spirits in Ireland; and it has been observed, that it imposes this duty *on the license*, and that it is payable on the *license alone*. With that observation I fully concur. It is, I think, quite plain that, as I have already observed, this schedule creates two classes, and two classes only, of licenses; and looking at the whole code which regulates the excise duties in this country, there are but three classes of licenses mentioned in it; two of them consist of those classes created by this schedule, one of which may be called “the publican’s license;” and the other may be called for brevity, “the grocer’s license,” subject to this qualification, that the grocer shall not be at liberty to sell any spirits over two quarts, or any to be consumed on his premises. These are the two classes of licenses which existed at the time of passing the 6 G. 4, c. 81; and none others existed until the passing of the 6 & 7 W. 4, c. 38, which created a third class of licenses, as I shall presently show.

Now, the words which are to be found in this part of the schedule which contains the exception, are words *descriptive of the license*; and that they are so, appears by a reference to the 4th section of this Act, which is in these words:—"And be it further enacted, that from and after the said 5th day of July 1825, all persons who shall be duly licensed under this Act, to deal in coffee, tea, &c., shall be deemed grocers, and be entitled to take out *the license hereinbefore mentioned*, to retail spirits in any quantity not exceeding two quarts at any one time, and to be consumed elsewhere than on the premises." Now, there has been no description of license given previously, except that which is found in the schedule; and consequently, it appears manifest to me, that these words in the schedule are words descriptive of the license to be granted to this class of traders, who fall within the exceptions therein mentioned. This section then entitled the party described in the exception, whom for shortness sake I shall term a "grocer," to get a license authorising him to sell any quantity of spirits not exceeding two quarts, to be consumed elsewhere than on the premises; and to that license he was entitled on the payment of the higher rate of duty; because he was the person getting that license by virtue of that exception referred to in the 4th section of the Act. That is the license, as it appears to me, to which the high rate of duty is attached; which by the rate is not attached by any law, that I can find, to any other license for the sale of spirits by retail in this country. This, as I conceive, was the state of the law founded on the 6 G. 4, c. 81, until the passing of the 6 & 7 W. 4, c. 38, which has created all the embarrassment in this case. I entirely agree, that the 6 & 7 W. 4 is an amendment of the former Act of the 6 G. 4, and must, therefore, be read as part of that Act; and that, being *in pari materia*, they must be taken together. Viewing them in this way, let us consider what has been the effect of the passing of the 6 & 7 W. 4, c. 38.

I have already said, that this latter Act is not, properly speaking, a fiscal Act; it however contains a vast variety of regulations, by which the trade is to be carried on and governed. Perhaps it may be called the Police or Regulation Act, by which all trades subject to the excise surveillance shall be conducted. My view, therefore, is this, that the 6 & 7 W. 4, c. 38, did amend the 6 G. 4, c. 81, in respect to the regulations by which trade is to be carried on, but that it was not the intention of the Legislature, in passing that Act, to interfere with the fiscal part of the previous statute at all.

Now, under the 6 G. 4, c. 81, a seller of coffee, tea, &c., might be licensed to sell spirits in any quantity under two quarts, in his grocer's shop, or anywhere else; and his only restriction was, that it should not be consumed upon the premises. But by the 6 & 7 W. 4, c. 38, the rights of the retailer were considerably abridged. He might, under the

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former Act, be licensed to sell any quantity of spirits under, and up to, two quarts; but by the subsequent Act, if he be licensed to sell less than a pint, it must be at some place one quarter of a mile distant from his grocer's shop; and he cannot in his grocer's shop sell less than one pint. So that this statute of the 6 & 7 W. 4, c. 38, creates a new description of license, which had not any existence in the year 1825, nor until 1836; and the 3rd section is the section which has this effect.

It was argued, on the part of the Crown, that the effect of this 3rd section of the 6 & 7 W. 4, c. 38, was to substitute the license therein described for the license contained in the 6 G. 4, c. 81; and so to leave it subject to the duty imposed in that schedule. In my humble judgment, however, it cannot have any such operation.—[Here his Lordship read the 3rd section of the 6 & 7 W. 4, c. 38.]—Now, we had this subject under the consideration of this Court very recently in the case of *McKenna v. Pape*,* when judgment was pronounced by this Court; and the reasons assigned by my Lord Chief Justice, on that occasion, and those previously assigned by Lord Chief Justice Bushe, in the case of *Boland v. The Commissioners of Excise (a)*, warrant me in saying, that the policy of this enactment was to prevent one and the same person from carrying on the trade and business of a grocer, and of a spirit retailer, in one and the same house, or within such a distance of it as would endanger the public morals; and let us now see what was the mischief against which the Legislature sought to protect the public.

There were two classes of traders, viz., the open professed publican, who kept a retail spirit shop, and who might sell every small quantity he pleased, to be consumed on the premises; and there was also a class of grocers, who were likewise retailers of spirits; and the object of the Legislature was, that this latter trader should not be the keeper of a dram-shop; and should not, therefore, be at liberty to sell spirits to be consumed on the premises; because it had been found, that respectable classes of persons, who would be ashamed to go into a common dram-shop, might be tempted to become tipplers in grocers' shops behind tea chests, sugar hogsheads, screens, &c.; and I conceive that it was to prevent this mischief, that the regulation separating the two trades was made, and this Act was brought in by one of the learned Judges now sitting on this Bench, whilst Attorney-General for Ireland, for remedying this evil. The bill was not, therefore, as I have said, prepared and brought in by the Treasury, but by the Irish office. I may here state, that there is a curious circumstance in the history of these statutes; for after the passing of the 6 & 7 W. 4, c. 38, and in the same session of Parliament, another Act was brought in by the Government (6 & 7 W. 4, c. 72, s. 15,) to suspend its operation, which received the royal assent the 13th of

* *Ante* p. 98.

(a) 2 J. & S. 249.

August 1836. This I mention, as showing that the Legislature probably deemed it an ill-considered, or improvident Act.

I have said, that this Act creates a new modification of license ; but as I conceive, it annexes no duty to that new class. In point of fact, it does not profess to do so. If it were intended to fix a new duty on this license, different from that which I contend was imposed by the schedule of the 6 *G.* 4, c. 81, on all trades not included in the exception mentioned therein, the 6 & 7 *W.* 4 ought to have gone on and said so distinctly. It says no such thing, however ; and therefore, in my mind, the Legislature, in passing this Act, cannot be deemed to have contemplated a fiscal regulation at all, but a mere regulation as to the manner in which this peculiar branch of the trade should for the future be carried on.

Let us now consider the effect of this amendment by this statute, on the 6 *G.* 4, c. 81, and how it operates. It has been said, that you are to treat the two Acts as an equity pleader would deal with a bill in Chancery after an amended bill has been filed, by considering the amended matter as substituted for the original matter ; and how is that to be done here ? I conceive it cannot be done by way of substitution. You can strike nothing out of the 6 *G.* 4, c. 81, for the purpose of putting in its place words supplied by the subsequent Act. The amendment then cannot be effected by substitution,—it must be by the embodying of the new matter in the section which it is meant to amend, in the way I shall point out hereafter ; because, as I take it, on the true construction of the 6 & 7 *W.* 4, c. 38, it is quite competent for a grocer in Ireland to have a license to retail spirits in another house, at a distance more than a quarter of a mile from his place of business as a grocer, upon the payment of the higher rate of duty mentioned in the schedule to the 6 *G.* 4, c. 81. A grocer was not to be allowed to carry on the retail spirit business, selling quantities less than one pint in his house, or within one quarter of a mile of it ; and therefore the 6 & 7 *W.* 4, c. 81, nullifies the license granted to a grocer to retail spirits in his own house, unless it restrains him from selling a less quantity than a pint ; and there is nothing to prevent him from having the license mentioned in the 6 *G.* 4, c. 81, provided he does not carry on the retail trade, selling less than a pint at a less distance than one quarter of a mile from his grocery establishment. Now, it appears to me, that the license to a grocer, subject to that restriction of not selling less than a pint, is less beneficial to him, than that giving him authority to sell any quantity he pleased up to two quarts. It is so manifestly ; and who shall say that the Legislature did not intend that he should have that less beneficial license at the lower rate of duty ? In my opinion, Acts of Parliament of a fiscal nature, imposing burdens on the subject, ought to be expressed in plain, unambiguous, and intelligible language. That doctrine has been laid down by very learned and able Judges, among others, by Lord Eldon and Lord Ellenborough ; and there cannot, in my mind, be a sounder doctrine, nor can it be too often

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repeated from the Bench. The language of these fiscal Acts of Parliament should be plain and intelligible, so that they may be easily understood by the mercantile and trading community—by plain men, who on reading them, may understand them, without the assistance of a lawyer; and without having at their elbow a special pleader or equity draughtsman. And here perhaps it would be sufficient for me to say, that if this duty be at all imposed, it has not been done in that plain intelligible manner required by that sound principle of law to which I have just adverted; but I am satisfied, that there is no duty in point of fact imposed, or intended to be imposed on this license.

It must, I think, be admitted by the Counsel for the Crown, that the construction they contend for is, at least, subject to great doubt and difficulty. The case was argued twice before the Court of Exchequer, and the Lord Chief Baron differed in opinion from the other Barons of that Court. There is also a great difference of opinion between the Judges in this Court, showing very clearly that the language of the Act in question is any thing but clear and unambiguous. As I have said, however, I do not rest my opinion on that point, but on this, that I conceive there is no statute imposing, or even professing to impose a duty on this *new* description of license.

But it has been said, that the plaintiff is charged with the higher rate of duty independently of the 6 & 7 *W.* 4, c. 38, by virtue of the 6 *G.* 4, c. 81, and that it lies on him to show that he is discharged from that impost. That may be said; but it remains to be proved that he is so charged. He is not charged by the 6 & 7 *W.* 4, c. 38, nor is he a grocer, being a retailer of spirits subject to the exception contained in the schedule to the 6 *G.* 4, c. 81, because he is not a person at liberty to sell from two quarts down to a *minimum*; and consequently, the higher rate of duty in that schedule is not applicable to his license.

I have said, that this amendment of the 6 *G.* 4, c. 81, does not operate by way of substitution; and if so, it may be asked, how then does it operate? It operates on the 4th section of that statute, which I read as amended thus:—"All grocers (for brevity) shall be entitled to take out a license to retail spirits, in any quantity not exceeding two quarts at any one time, and to be consumed elsewhere than on the premises, provided the place where such retail trade is carried on shall not be in or *within* one quarter of a mile of his grocery establishment; but if it be in the house, or *within* one quarter of a mile of his grocery establishment, then he shall have a licence to sell in quantities not exceeding two quarts, and not less than one pint, and to be consumed elsewhere than on the premises; and any other license granted after the passing of this Act to any such grocer, shall be wholly null and void."

In conclusion, let me ask whether it would be reasonable to hold that the Legislature intended, by the 6 *G.* 4, c. 81, passed in 1825, to impose a rate of duty on a license which was not created until 1836? and how

can this amendment be carried back to the 6 *G. 4*, so as to warrant this Court to say that the statute of 1825 affixed a duty on a license which had no existence until 1836? That is a construction which, as I conceive, cannot be maintained.

On the whole, therefore, my mind is quite satisfied that the plaintiff was entitled to judgment below; and consequently, I am of opinion, that the judgment of the Court of Exchequer ought to be reversed.

LEFROY, B.

In this case, my Brother Jackson has so fully stated the verdict, as appearing on the face of the record, that it will not be necessary for me to do more than to state the summary of it. The plaintiff rests on a title to get a license of a particular description for selling spirits; and when he relies on a title, he is bound to show his title to the license he requires. He rests not on his title to get that license which he insists on without paying duty: that case has, as I understand it, been disclaimed at the Bar; and, therefore, I do not mean to advert to it. It was, I believe, found to be too strong a proposition to contend for; but he rests his title to get a certain license at a low rate of duty, which he specifies on the circumstance of being "a grocer." That is his title; and because he is "a grocer," he claims that license, and insists upon paying for it a low rate of duty. It is not, therefore, a title to get a license without any duty—it is not a title to get a license as a publican is entitled to get his license; but a title to get a license such as a grocer is entitled to get, which latter license he has taken, and with which he has fettered himself; and to the disadvantages of which he is, therefore, as much bound on the one hand, as he is entitled to the privileges it confers on the other. That is his claim; and in advancing it, he admits that he cannot make out his case fully under the 6 & 7 *W. 4*, c. 38, but only to this extent, that he is entitled to a certain form of license which he can get, and which he has taken out, but, under that Act, he cannot lay his finger on the duty he has to pay for it; and therefore it is, that he must fall back on the 6 *G. 4*, c. 81, which distinguishes between his right as a publican, and his right as a grocer, to get a license, and which annexed to the licenses distinct duties. He says, "I am bound to pay a duty which is to be paid by a grocer, according to that Act; but then as a grocer, I am only to pay the duty payable by retailers under that Act, but which retailer's license is not the license I claim, but a totally different one; and getting that license, which is a grocer's license, not in the terms of it, but in the character of the person that gets it, and which I could only get, I am not to pay the grocer's, but the publican's, duty, whose license under that Act, upon which I am driven back, I could not get."

Well, then, it is admitted, that he must fall back on the 6 *G. 4*, c. 81;

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and the fact being so, it appears to me, that the whole of this case turns on a minute attention to the provisions of that Act, and an accurate discrimination of the different words of it. By paying attention to it in that minute way, I think that we may come (at least my humble judgment has come) to a clear conclusion in this case.

Now, the objects of the 6 *G.* 4, c. 81 (as appears by its title), are to repeal all former duties, to ascertain all duties to be thenceforward payable, and to amend the laws for granting excise licenses. These are its three objects; and they are, therefore, to be considered under this Act, as well as its provisions, which are mainly to be attended to, as also the licenses grantable under it, the nature of them, the duty to be paid, and the title to get them. Now, what is to entitle a party to get a license? It is not the payment of the duty alone, but he must have a title beyond that conferred on him by the payment of the duty. This Act ascertains three things:—The body of it ascertains the title to get the license; the schedule ascertains the nature of the license to be given; and the schedule ascertains the amount of duty to be paid. Unfortunately, the schedule is prefixed to the body of the Act, instead of following it; and if this schedule had been placed, and read after the Act, a great deal of obscurity would have been avoided; because then we would have had an opportunity of seeing at once, who was to get that license, and then the amount of duty; but it begins with the schedule, and thereby to a certain extent an obscurity has arisen.

But taking it as we find it, let us see what is the nature of this schedule introduced into the Act by the 2nd section. It commences thus, “For and upon every excise license,” that is, instead of the duties imposed by former Acts, new duties shall be paid. There is the object of the schedule, to ascertain for us the amount of duty to be paid “for and upon every excise license,” to be taken out by the various persons in this Act mentioned; and affixing inseparably upon the licenses to be taken out, the duty to be paid, so as to make the duty and the license perfectly correlative, to bind them together, as it were, in a bond, so that the one ascertained the other. The duty being fixed, the nature of the license was at once recognised, and then the latter could not be obtained without the payment of the former. Such, then, is the object of the schedule. It then goes on to state, in respect to “spirits,” the duties, and to describe those who are to pay them, not describing the title minutely, but in the general terms here set out; “Every retailer of spirits, except retailers of spirits hereinafter mentioned.”

Now, taking this schedule independently of the Act, it was said, a grocer would be entitled to a retailer’s license, but for the word “retailer.” That observation was made at a venture, and without looking into the body of the Act. I deny the proposition; for having taken a grocer’s license, he was fettered by this Act, and therefore, could not get a

retailer's license, at least, without qualifying as every retailer is bound to qualify, in the way prescribed in the body of the Act. By the 13th and 14th sections, we find that a general retailer is expressly prohibited from getting this license, unless he has a beer license, which he can only have by going before a magistrate, and thereby entitling himself to get it, as also his license for the retail of spirits to be consumed on the premises. Therefore, a retailer was bound to get a retailer's license, and to pay only the duty imposed on a retailer's license; and he was also bound to qualify himself in that manner before he could obtain his license; which license is specified here in this schedule.

Now, what was the grocer's title? A grocer's title, by the 4th section, is thus defined:—"That all persons duly licensed as grocers, shall be "entitled to a license authorising them to sell spirits in any quantity "under two quarts, but not to be consumed upon the premises." Here is the grocer's license, differing from the publican's in this essential respect, that it was a title founded on having a grocer's license for the sale of coffee, tea, cocoa, chocolate and pepper, in his hands; which latter license not only gave him a title to the one he sought, but also exempted him from going before a magistrate. But for that license,—under which he enjoyed privileges and immunities which the publican did not possess (viz., freedom from the necessity of qualifying before a magistrate, and the surveillance of the police), he was bound to pay an increased rate of duty.

Let us now come to that which is the most important part of the argument in this case—viz., the nature of *the saving*, and what it is. The words of it are:—"Every retailer of spirits in Ireland, being duly licensed "to trade in, vend, and sell, coffee, tea, cocoa, chocolate and pepper, "and not selling spirits in greater quantities at one time than two quarts, "or any spirits to be consumed in the house, or on the premises, of such "retailer." This is, in the first place, a description of the person—viz., a grocer; and, in the next place, of the license which, as a grocer, he is entitled to get under the 4th section of 6 G. 4, c. 81. This saving is as if it had been thus written:—"A grocer entitled to take out a license "under this Act—viz., the license specified in the 4th section,—shall then "pay on his house, if of such and such a yearly value, such and such a "duty." If therefore, this schedule had followed the body of the Act, it would have been much more simple, for then it would run thus:—"A "grocer taking out a license as in the 4th section, shall pay the amount "of duty as in this schedule specified." If therefore, a party, *as a grocer*, takes out that license, he must pay the high rate of duty specified in this schedule; and therefore, the 6 G. 4, c. 81, has made a perfect wall of separation between the publican's and the grocer's license—between the man who claims a spirit license *as a publican*, and the man who claims it, *as a grocer*; because the latter has already got a grocer's license.

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Then comes the body of the Act, which I have already anticipated. But there is more in this Act to which it is necessary to call attention. How are the duties to be enforced? May the Act be violated with impunity? See what the 26th section enacts.—[His Lordship here read that part of the 26th section which speaks of imposing penalties for not taking out licenses as required by the Act.]—Now, here is the only security for the duties prescribed by this Act. There are no duties imposed by the 6 & 7 W. 4, c. 38; and therefore, the party must fall back to this Act to ascertain the duty; and if so, how is he exempt from penalties under it? It is said, in reply, there is no such license now as the license specified in that Act, and therefore he is not to pay the high rate of duty imposed on the grocer's license, but that imposed on the publican's license. But the difficulty is, that not being a publican under either of the Acts, how can the penalty be attached to him? If he is a grocer, he must pay the duties under the 6 G. 4, c. 81, because, as I shall presently show, the terms of that license are only varied by this 6 & 7 W. 4, c. 38, which being an amendment, we must read:—"The license under this Act, or any other Act of which this is an amendment." It is as if the 6 W. 4 had by anticipation these words in it:—"Or any license brought within this Act, by any other Act amending it."

It was admitted by Counsel, that if the plaintiff stood on the 6 G. 4, c. 81, he must pay the higher rate of duty, and that he could not claim a publican's license. Now, let us see whether the 6 & 7 W. 4, c. 38, has made any difference with respect to the duty he is to pay. It recites an Act passed in the 3 & 4 W. 4, c. 68, which recites the 6 G. 4, c. 81; and therefore, *in limine* we have the 6 G. 4, c. 81, recited in this Act. It then recites not only that it is expedient to amend that Act, which I admit only dealt with the 6 G. 4, as relates to publicans, but to amend it *quoad* grocers; and it then goes farther, and makes new regulations in respect of the sale of spirits in Ireland; but does not profess to repeal any part of the 6 G. 4, c. 81, although the 3rd section has been argued on as if it were a clear repeal of it—[His Lordship here read the 3rd section of the 6 & 7 W. 4, c. 38.]—This, we are told, is an Act entitling the grocer to get his spirit license on the payment of a publican's license duty. Now, I say it gives him no title at all. It takes away his title to get a license on any other terms, or in any other form, than is therein specified: but to make his title, he must go back to the 6 G. 4, c. 81; for the words, "any *other* license," would have no meaning if we did not thus go back. It gives him no abstract title, but presumes a title to get a license; and where do we find that existing title, but in the 6 G. 4, c. 81?

Now, I should desire to know, whether a man, after the passing of the 6 & 7 W. 4, c. 38, having a grocer's license, retailing spirits without a spirit license, does or does not incur a penalty?—and if so, what is the

penalty, and how does it fall on him? It comes to this virtually—either this Act must be taken *per se* to give him a license without duty, and therefore the license duty and penalty fall to the ground; or it upholds both the duty and the penalty. Now, to hold that there was no duty payable on the license, according to the latter Act, would be too monstrous a proposition to contend for, nor was it so argued by the plaintiff's Counsel; and if a duty or penalty is to be paid, where do we find them, if we do not go back to the 6 *G.* 4, c. 81? The argument that the duty and the penalty are both taken away would be unanswerable, if it were not that the 6 & 7 *W.* 4, c. 38, is but an amendment of the 6 *G.* 4, c. 81. But if it is admitted, that you are to have a duty under the 6 & 7 *W.* 4, and a penalty to enforce that duty under the 6 *G.* 4, let us see what is the penalty to be enforced. The penalty mentioned in the 26th section is a penalty inflicted on a grocer for not paying the grocer's spirit license duty, enumerated in this penal section, "Every retailer of spirits in Ireland, being duly licensed," &c.; and it is not a penalty for not paying the publican's license.

The objects of the 6 *G.* 4, c. 81 being, as I have already stated, threefold—viz., the terms of the license, the persons entitled to it, and the duty payable thereon, the 6 & 7 *W.* 4, c. 38, deals with the two former, and does not pretend to make any alteration with respect to the duty, which it leaves untouched, as also the penalty for enforcing it. Now, it is said, that it could not be conceived that the Legislature could have designed to impose a high rate of duty, or that the high rate of duty should be continued to be paid, on a less beneficial license; and that the trader ought not to be perplexed with doubtful legislation. But traders need not be perplexed, if they are not desirous of making a grievance out of that to which the Legislature have not applied themselves at all. The question here is, as to the duty to be paid, and not as to the license to be taken out. That has been left quite explicit; and the only difficulty arises from implying, or attempting to prove, that the Legislature meant to deal with that they had no intention of dealing with—viz., the duty to be paid by a grocer, having about his neck, as it were, the clog of a grocer's license, which obliges him to take out a grocer's retail license with all its burdens. It is not, therefore, because his license was more or less beneficial as to the quantity of spirits to be sold, or the place where to be sold, that the high rate of duty was imposed; but because he got the privilege of obtaining this license without a beer license, and without going before a magistrate—in fact, without a publican's qualification; and he was allowed the privilege as a *bonus*, not because the quantity to be sold at a time was more or less, but because, as a grocer, he could obtain it *ex debito justitiæ*.

With respect to the effect of the 6 & 7 *W.* 4, c. 38, on the 6 *G.* 4, c. 81, as an amendment of it, I know of no other manner of treating an

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Act amended, save by excision, that is to say, by obliterating the old, and inserting the new matter; just as you would amend a bill, by substituting the new words for those which are to be expunged. No lawyer will say that the amendment is not to be taken as the body of the Act; and I am, therefore, correct in taking the 6 & 7 W. 4, c. 38, as a part of the 6 G. 4, c. 81. The later Act attaches all the qualifications in the old grocer's license, which were rendered necessary by the 6 G. 4, c. 81. That license is distinct from the publican's license, not by the quantities of spirits authorised to be sold under it, but by the word "grocer," under which a party gets the license *ex debito justitiæ*, and because he is a grocer. On the other hand, the publican is not entitled to his license without performing certain requisites, which, when performed, constitute his qualification.

On these grounds, therefore, my mind has been brought to the conclusion, that the plaintiff in this action is not entitled to succeed, and that, therefore, the judgment of the Court of Exchequer ought to be affirmed.

BALL, J.

In this case, I must state in the outset, that my mind has varied considerably during the discussion which has taken place. I concur with my learned Brethren, that the question to be decided is one of considerable doubt and difficulty, as is exemplified by the variation which my own judgment has undergone in the manner I have stated. The principle on which I put the case is that which has been clearly put by my learned Brother Jackson, and which I adopt as being the true constitutional principle on which the Court is bound to pronounce its judgment; and that is, that the subject is not to be taxed, or to have any duty imposed on him, but by the clear and express language of the Legislature, or by what I admit to be the same, necessary implication.

In the case now before the Court, there can be no doubt, but that under the 6 G. 4, c. 81, if unrepealed, a grocer would be subject to the high rate of duty, payable on that particular species of license which a grocer was by that Act entitled to take out; and so far there is no controversy; but the controversy arises on the 6 & 7 W. 4, c. 38, s. 3; and it is suggested, on the part of the plaintiff, that this enactment, having reference to the situation of the premises on which a grocer is permitted to carry on his retail business, repeals, and substantially annuls, the license which was specified in the exception contained in the schedule to the 6 G. 4, c. 81. It was then contended, on the part of the defendant, that the plaintiff was subject to the high rate of duty payable on the license specified in the exception contained in the said schedule; and it is a presumption which must be in favour of the defendant's argument, that the Legislature having said nothing about the duty in this Act of

the 6 & 7 W. 4, c. 38, they, therefore, intended that the high rate of duty which was payable by the 6 G. 4, should be likewise payable for the license mentioned in the later Act. Now, with reference to that argument, I would ask, is such a presumption consistent with that sound and constitutional principle of the law, that the subject is not to be taxed, unless upon a clear enactment, or necessary implication? There is clearly no express enactment imposing the high rate of duty; and if that be the case, let us now see if there is a "necessary implication," to enforce the defendant's view of the case.

I take "a necessary implication" to be, not guess, not probability, but an inference which by no reasonable intendment can be otherwise. It is a state of things excluding any reasonable conclusion but the one. This, I conceive to be the true character of a "necessary implication;" and if that be so, let us apply it to the present case. If the Legislature framed this 3rd section, without saying any thing about the duty which was to be annexed to the license mentioned therein, is it a necessary intendment, or an inference which can by no reasonable intendment be otherwise, that the old duty should be annexed to it? The new license is obviously less beneficial than the old one. It excludes the grocer from the right to sell by retail any quantity of spirits less than a pint, while under the former license he was permitted to sell any quantity, however small, but not exceeding two quarts; and there is a further restriction as to the place of carrying on his spirit trade. If, therefore, the new license is less beneficial than the old one (and admittedly it is so), is it a necessary inference that the Legislature intended that the same duty should be paid on it, as was paid for the more beneficial license under the 6 G. 4, c. 81? Under these circumstances, I, for one, cannot come to the conclusion that there is here a necessary implication, or inference, to satisfy the Court in pronouncing that the subject is liable to this high rate of duty.

I could understand a different state of things, if it were contended that the effect of this silence of the Legislature was to exempt him from the payment of any duty whatever. But that is not the argument here. It is not argued that the plaintiff is not liable to any duty whatever. That position has been given up—and very properly so; because in my opinion, although the plaintiff is not subject to the high rate of duty, yet he necessarily comes under some prior part of the schedule, comprehensive enough to embrace, and subject, him to the lower rate of duty, under the head of "every retailer of spirits."

There have been some very important views taken of the question by the learned Counsel who have argued this case on the part of the defendant, with which it is necessary that I should deal very strictly. In the first place, it has been insisted, that the plaintiff, in order to entitle himself to any license, must claim it under the 6 G. 4, c. 81; and further,

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that he must claim it under the exception contained in the schedule, being entitled to it as a grocer. But, supposing that I am right in holding that the effect of the 3rd section of the 6 & 7 W. 4, c. 38, is to annul that exception *quoad* grocer, it is wholly out of the question that he claims any thing by reason of that exception, although he may under the head of "every retailer of spirits." With respect, however, to this argument, that if the plaintiff claims title to a license he must establish it under the 6 G. 4, c. 81, it is necessary that I should advert to the 3rd section of the 6 & 7 W. 4, c. 38, which creates a license for the plaintiff for the first time, and which the plaintiff asks permission to obtain, paying a lower rate of duty than that specified in the schedule to the 6 G. 4, c. 81.—[Here his Lordship read the 3rd section of the 6 & 7 W. 4, c. 38.]—These are the terms on which a grocer must take out his license; and it is then said he must make out a title to get that license. Now, what is the import of the word "title?" Can any person read this 3rd section, and not come to the conclusion, that the true construction of it is this? "Whereas, by a former statute, the grocer in Ireland was "entitled to a license of a particular description; be it therefore enacted, "that for the future, the grocer shall not be entitled to that license, but "another license, viz., that specified in the 3rd section." This 3rd section must be read, as not only denying to the grocer the old license, but positively enacting that he shall not get any other license than that specified in the section itself, and which license it substitutes for the former one.

It has been suggested also, that if we adopt the conclusion that the plaintiff here is to be subject to the lower rate of duty, applicable to "every retailer of spirits," we shall be at a loss how to enforce the penalty; and the inference is drawn, that if you cannot enforce the penalty, you have strong grounds for concluding that it was not the intention of the Legislature to subject him to the high rate of duty. Now, I should say, assuming that the penalty could not be enforced by reason of a mistake of the Legislature when framing the 3rd section of the 6 & 7 W. 4, c. 38, in not imposing a penalty for non-compliance of taking out that license, we are not here to repair the mistakes of the Legislature, but to interpret the law as we find it, without speculating on what was, or was not, their intention; we must have express words, or a necessary inference, in concluding that the Legislature did mean a penalty, when they have not said so. But it is not without remedy; for I find it enacted in the 19th section of the 6 & 7 W. 4, c. 38, "that if "any person be not duly licensed he shall forfeit and lose the sum of "£20;" so that we have got by anticipation a section, applicable to the new license; and, therefore, even if we had no penalty given by the 6 & 7 W. 4, c. 38, s. 3, and if this penalty under the 6 G. 4 could not be enforced, we have this section under which the party could be sued at the suit of the Crown.

It was suggested, moreover, that this 3rd section ought to be treated as a mere amendment to the exception in the schedule of the 6 *G.* 4, c. 81, that is to say, it ought to be read as if it were incorporated in that schedule, as if the words "hereinafter mentioned" were expunged, and the words in the new enactment placed in their stead, which would have the effect of leaving the rate of duty untouched. Now, this view did strike me as of importance in the consideration of this case; but the suggestion obviously depends upon the strict technical circumstance of the 6 & 7 *W.* 4, being, and purporting to be, an amendment of this portion of the schedule. But the 6 & 7 *W.* 4 does not purport to be an amendment of the 6 *G.* 4, or of any exception in this schedule, or of any enactment in the 6 *G.* 4, having reference to grocers. It is entitled an Act to amend the 3 & 4 *W.* 4, c. 68, which is confined solely to publicans' licenses, and the police arrangements of public-houses, and has no reference whatever to grocers. Accordingly, an Act purporting to amend the 3 & 4 *W.* 4, c. 68 is, in one sense, an Act amending an Act of which the 3 & 4 *W.* 4 purported to be an amendment; but the 3 & 4 *W.* 4 having confined its amendment to one portion alone of the 6 *G.* 4 relating to publicans, that of the 6 & 7 *W.* 4 must be confined to that portion also, and must be an amendment relative to publicans alone. I, therefore, treat this enactment of the 3rd section of the 6 & 7 *W.* 4, c. 38, as a substantially distinct piece of legislation, and incapable of standing with the 6 *G.* 4, c. 86, but not as an amendment of any portion of it having reference to grocers.

It has been said, that the true reading of the exception in the schedule to the 6 *G.* 4, is, that the words "every retailer of spirits in Ireland, "being duly licensed to trade in, vend, and sell coffee, tea, cocoa, chocolate "and pepper," are to be taken as descriptive of the persons who, under this portion of the schedule, are to be subject to the high rate of duty; and that the words, "not selling spirits in quantities under two quarts at any one time" are descriptive, not of the person, but of the license; and which, taking them grammatically, ought, I think, to be read as if in a parenthesis. But does that alter the case? Must they not be taken as describing the person holding a license such as is "hereinafter mentioned?" and if that be so, does not the annulling of that license alter his character? and if so, how can it be said that the high rate of duty is still to be applied to that which is no longer in existence?

I have occupied the Court much longer than I intended; but finding it necessary to alter my opinion on the subject, I thought it incumbent on me to go much further than I at first designed. The conclusion at which I have arrived is, I must say, one of considerable doubt; but the weight of the arguments, and the principles of law, appear to me to be on the side of the plaintiff, and to decide the question at issue, viz., that he is not subject to the high, but to the lower rate of duty; and that

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RICHARDS, B.

The term "grocer" was obviously a generic term, well known to the excise and revenue laws of Ireland at a very early period; and the policy of not allowing that class of persons to retail spirits *ad libitum* was also well understood, and has been acted on for a great many years. By the 45 G. 3, c. 50, grocers were prohibited altogether from selling by retail spirituous liquors on the premises whereon they carried on their trade as grocers, or to take out a license for that purpose. But the law in that respect was relaxed by the 47 G. 3, c. 12, s. 14; and grocers, by that Act, were allowed to take out spirit retail licenses, but not to sell in quantities less than two quarts nor in any quantity to be consumed on the premises. The 53 G. 3, c. 137, also made provision for the granting of spirit retail licenses to grocers, under certain restrictions.

By the 55 G. 3, c. 19, and by the schedule thereto, the grocer is, *eo nomine*, subjected to a particular duty as grocer; and grocers there were declared to include vendors of foreign grapes, foreign currants, raisins and figs; and though vendors of tea were classed in the same category with grocers, I do not recollect exactly whether vendors of tea were at that time necessarily grocers within the meaning of that term as understood in the revenue laws; nor is it indeed very important to inquire whether they were so or not. The 58 G. 3, c. 57, s. 2, repeals all the former regulations respecting grocers, and enacts that licensed grocers shall be capable of being licensed to sell spirits by retail, but not to be consumed on the premises, or in any out-house, &c., belonging to such grocer; and not to sell same except in quantities less than two quarts. The 3rd section regulates the duty payable on such licenses. Now, the term "grocer," as used in that Act, connecting it with the previous statute, does in my opinion very plainly include tea dealers. The 6 G. 4, c. 81, s. 2, and schedule thereto annexed, allows every one (save licensed dealers in coffee, tea, cocoa nuts, chocolate or pepper) to take out a retail spirit license, on production of a retail beer licence; and the beer license was to be obtained on the Justice's certificate (see sections 13 and 14 of that Act); so that no one could obtain the general retail spirit license without the Justice's certificate; and the excepted class of licensed dealers in coffee, tea, cocoa nuts, chocolate or pepper, could not obtain such general spirit retail license at all.

Now, if there was at this time, any class of persons known to the excise laws as falling within the term "grocers," other than dealers in coffee, tea, cocoa nuts, chocolate and pepper, they do not appear to have been in any way distinguished by the legislation contained in the 6 G. 4, c. 81 (whatever restrictions they were subjected to before the passing of that Act), from the body of the public; or to have been prohibited from

obtaining, under the provisions of that Act, a general retail spirit license, whatever their other trade might have been ; but unquestionably, for some reason or other, dealers in coffee, tea, cocoa nuts, chocolate or pepper, were prohibited from so doing. Possibly, it was thought no mischief to allow dealers in foreign fruit, figs, and the like, to unite the trade of a publican with their other trade, though it was thought unadvisable to allow dealers in coffee, tea, cocoa nuts, chocolate and pepper, to do so. But I shall not stop to inquire why the distinction was made by the Legislature between dealers in foreign fruit and dealers in tea and coffee, though I think I see good reason for it—indeed, my Brother Jackson has suggested a very sufficient reason.

Now, all persons theretofore known as grocers, other than dealers in coffee, tea, cocoa nuts, chocolate and pepper, were no longer (I mean from the passing of the 6 G. 4), in my opinion, regarded by the excise laws as falling within the class of persons called grocers ; nor were they subjected to any duty, as such, by the 6 G. 4 ; and I take it that from the passing of the 6 G. 4, the only persons recognised by the excise laws as grocers, were dealers in coffee, tea, cocoa nuts, chocolate or pepper ; and certainly no duty is imposed, at least, that I can discover, on any other class of grocers. The revenue laws, therefore, know them not ; but the Legislature knew that all grocers before that Act were, by the prior Act of the 58 G. 3, prohibited from retailing spirits, save in quantities less than two quarts, and not to be drunk on the premises ; and accordingly, a provision, all but identical with that, was retained in respect to the only class of persons then recognised as grocers ; and that accounts for the language of the 4th section of 6 G. 4, which was manifestly only intended to operate in respect to dealers in coffee, tea, cocoa nuts, chocolate or pepper, though the term “grocer” is also used in that section.

Now, the first question to be considered, as it occurs to my mind, is, whether licensed dealers in coffee, &c., could, under the 6 G. 4, by any construction of that Act, obtain a general retail spirit license, such as the publican was entitled to take out ? I am not aware that it has in this case been argued *ex directo*, that they could, though the argument advanced for the plaintiff Dickson would, if well founded, prove that they might ; for it is said, that the licensed dealers in coffee, &c., were not, as such dealers, excepted out of that part of the schedule to 6 G. 4, which authorises the obtaining of a general retail spirit license. It is said, that the excepted class must not only be licensed dealers in coffee, &c., but also persons not selling spirits in any greater quantity at any one time than two quarts, or any quantity to be consumed in the house or premises of such party ; and that no one, unless falling in all respects within that definition, can be considered as a person excepted out of the early part of the schedule that authorises the granting of general retail spirit licenses. But it is very manifest to my mind, that that cannot be the true construction of the

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Act; for if it were, it would be always in the power of the dealer in coffee, &c., to take himself out of the exception, by declining to comply with the restriction to retail spirits in quantities not exceeding two quarts. He might say, "I am not a licensed dealer in coffee, &c., retailing spirits in quantities not exceeding two quarts;" and further, "I am not a retailer of spirits to be consumed elsewhere than on the premises; and therefore, I am not within the definition, and consequently, not within the exception in the early part of the schedule, and am therefore entitled to a general retail spirit license, on complying, like other persons, with the 13th and 14th sections of the Act." But that would be a very absurd construction to give the Act, and in direct variance with the principle of the decision of this Court in the case of *M'Kenna v. Pape*,* decided on the 6th of February 1845; and with the case of *Boland v. The Commissioners of Excise*, decided in the Queen's Bench, and reported 2 *Jebb & Symes*.

I take it that the words, "and not selling spirits in any greater quantity at any one time than two quarts, or any spirits to be consumed in the house or premises of such retailer," were intended as nothing more than descriptive of what was supposed to be the then existing state of the law respecting this particular class of persons, they having been prohibited by the 58 G. 3, as I have already mentioned, from retailing, save in quantities less than two quarts, and from selling in any quantity to be consumed on the premises: and it was for the purpose of avoiding any implied repeal of the law in that respect, and preventing misconstruction on that subject, that these particular words were superadded; just as if the Legislature had said—"A licensed dealer in coffee, &c., shall not be entitled to a general retail spirit license; but he may, nevertheless, have a retail license entitling him to do what by law he may do at present;" that is to say, to sell in quantities not exceeding two quarts, and not to be drunk on the premises. There is certainly a minute, but I am satisfied a mere accidental, difference, between the words used in the 58 G. 3, c. 57, and those in the schedule to the 2nd section of 6 G. 4, in respect to the restriction imposed on the grocer retailing spirits. The words in the 58 G. 3, c. 57, are—"In any quantity less than two reputed quarts;" and the words in the 6 G. 4, are—and not selling "in any greater quantity at any one time than two quarts." But I am not affected by that circumstance. In substance the restriction was the same, and was so treated and considered by the Legislature.

That these superadded words in the 6 G. 4, are not words of description of the person who is to get the license, is also (independent of what I have already said) to be collected, in my opinion, from other parts of the Act, 6 G. 4, c. 81, s. 4. Thus, it is enacted, that all persons duly licensed to sell coffee, &c., are entitled to take out a license to retail

* *Vide ante*, p. 98.

spirits in any quantity not exceeding, &c. It is not that any person licensed to sell coffee, &c., and not selling spirits in quantities not exceeding two quarts at any one time, shall be entitled to take out such license; but the license is given in respect of the class of persons, viz., licensed venders in coffee, &c.; and the authority conferred by such license, is made consistent (I mean substantially consistent) with the then state of the law. And again, in sect. 11, where spirit retailers are authorised to carry on trade in booths, the exception to that provision is confined to retailers of spirits licensed to sell coffee, &c., and not to such retailers selling in quantities not exceeding two quarts. And again, in sect. 26, where penalties are imposed for not taking out proper licenses, a penalty is imposed on licensed dealers in coffee, &c.; but not on such dealers selling in quantities less than two quarts, &c. These latter words were, therefore, introduced, as I have already said, to guard against the coffee dealer's license superseding or repealing the then existing state of the law, which restrained the grocer from retailing spirits *ad libitum*.

I take it, therefore, that the not selling in quantities exceeding two quarts, or not to be drunk on the premises, is in no way, whatsoever, a description of the party applying for the license; but (subject to the minute and accidental variance between the language of the two Acts, to which I have already referred), is a legislative recognition of the law as it stood in respect to dealers in coffee, &c., retailing spirits. So that, I think, we have a licensed dealer in coffee, tea, &c., expressly (and when I say expressly, I mean by express words) excepted out of the provision in 6 G. 4, that entitled all the rest of the community to obtain a general spirit retail license. A publican's license he, therefore, cannot have; the effect of the statute 6 G. 4 is to make the carrying on of the two trades incompatible on the same premises. That position I take to be very clear, and cannot be disputed. But a spirit retail license he may nevertheless have *ex debito justitiæ*, on paying the duty affixed to it in the schedule to the 2nd section of 6 G. 4.

The next Act to which reference has been made is the 3 & 4 W. 4, c. 68; that Act made various new regulations in respect to the obtaining and granting of general retail spirit licenses, but it does not profess to affect in any way the grocer's spirit retail license.

Then comes the 6 & 7 W. 4, which is not a fiscal Act, and does not profess to regulate the amount of duty payable for licenses, or to make any change or alteration in regard to such duties. It contains several restrictive regulations, as well with respect to publicans or persons having general retail spirit licenses, as to coffee and tea dealers holding spirit retail licenses. The 3rd section of that Act is the one that has created the difficulty—[Here his Lordship read the 3rd section]. Now, I confess I cannot understand this section as making, or intending to make, inferentially or otherwise, any alteration in the duty payable by a grocer

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for his spirit retail license. It changes the law, no doubt, in respect to the measure by which the grocer was to carry on the retail spirit trade. Some persons may think the variation more favourable than injurious to the grocer. I am not prepared here to say how that may be; but if such a variation as that was to annul the duty imposed on the grocer's spirit license, I see no reason why the several other restrictive enactments contained in that same statute should not also annul the duty imposed on the general retail spirit license. For example, by the 4th section, no general spirit retailer shall keep his house open for sale of spirits, or shall sell spirits to be consumed on his premises between nine o'clock at night on Sunday, and nine o'clock in the morning of Monday. Again, by section 5, it enacts that spirit retailers shall not keep open their booths or tents at fairs for sale of spirits, or sell spirits there except within certain hours; and penalties are imposed for every infraction of these provisions. Now, though these sections say nothing about the form of the license, I ask, do they not, by altering the law, alter, and materially alter, the effect of the license, and abridge the powers theretofore conferred by it? and if the Commissioners of Excise were desirous of introducing these restrictions into the license, might they not do so? Where would be the objection to their making the license exactly conformable to the law? I see none. But whether the form of the license be changed or not, the change in the law operates on principle just the same as if it were; and operates manifestly much more injuriously towards the publican, than the change made in the law by the 3rd section does towards the grocer; yet it has not been argued that the duty imposed on a general retail license is annulled or altered; nay, the argument is, that it is the duty imposed by 6 G. 4, on the general retail spirit license, damaged as it is, and changed as it is, in its operation and effect, by those enactments to which I have referred, that the grocer is now to pay; for it has been admitted by the Counsel for the plaintiff that he cannot claim the license without paying some duty. Without, therefore, going more at length into the subject, which I think it unnecessary to do, I must say, that in my opinion, both Acts (6 G. 4, and 6 & 7 W. 4) being as they are *in pari materiâ*, and the one an amendment of the law as it stood at the time of the passing of the other, should be read and construed together; and that the latter Act should, as far as possible, be considered as engrafted on the other; and that we should try and make the whole consistent as far as can be done. The principle upon which Acts *in pari materiâ* are to be construed, is fully and clearly laid down by Lord Alvanley in the case of *Davis v. Edmonson*, 3 Bos. & Pul., 382; and that case, in my opinion, fully supports the opinion at which I have arrived.

That the 6 & 7 W. 4 did not intend to make any alteration in the duty payable for retail spirit licenses by dealers in coffee, &c., is, upon

the whole, very plainly to be collected, according to the view I have taken of the case:—

First.—Because nothing of the kind is declared to be the intention of the Legislature by that statute.

Secondly.—Because no reason is to be collected from the Act why any such change should be made.

Thirdly.—Because the policy, which has existed for a considerable length of time, of not allowing dealers in coffee, &c., to carry on, at the same time, and in the same place, the trade of general retailers of spirits, is recognised and upheld as strongly by the 6 & 7 W. 4, as by the 6 G. 4; insomuch, that it has been ruled, that a person holding a publican's license, and paying the duty prescribed for that species of license, cannot get a coffee and tea dealer's license (*McKenna v. Pape*), which is some argument to show, that it was not intended that a licensed coffee and tea dealer should be charged the duty payable in respect of a publican's license, which latter license he could not hold with the other.

Fourthly.—The policy of the two Acts upon this subject is identical, save only as to a variation in respect to the state of the law touching the *minimum* and *maximum* quantities to be retailed at one time; and regard being had to the nature of these alterations, and to the other alterations affecting a general retail spirit license, or the powers conferred by it, I must say that they are not sufficient to lead my mind to conjecture, or suspect, that it was the intention of the Legislature to make any change in the amount of duty payable for a grocer's retail spirit license.

Fifthly.—If I am right in the construction which I have given to the schedule to the 2nd sect. of the 6 G. 4, viz., that dealers in coffee, &c., without regard to the exact measure by which they retail spirits, are excepted out of the provisions that authorise the taking out of a general retail spirit license; it follows, that no change in the law in that respect can impliedly repeal the express terms of the exception by which they are excluded by the 6 G. 4 from obtaining a general retail license, nor, in my opinion, repeal the express enactment by which, as such dealers in coffee, &c., they were obliged to take out a different license.

Sixthly.—I think we are driven to say, either that the duty was altogether repealed for retail spirit licenses granted to dealers in coffee, &c., or that they are subject to the larger duty; for I confess, I see no grounds, if they are exempted by law from paying the larger duty, why they should be charged a duty imposed upon a license never intended for them, and the full benefit of which they cannot have, and for the obtaining of which by those for whom it was intended, certain acts and matters are to be done and submitted to, which this particular class claim an exemption from.

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Upon the whole, therefore, I am of opinion, that the judgment of the Court below ought to be affirmed.

PERRIN, J.

The simple question for our consideration and decision in this case is, what is the duty payable by a grocer for a license to exercise his trade of selling spirits on his premises? and the answer to that depends upon the statutes of the 6 G. 4, c. 81, and 6 & 7 W. 4, c. 38—but mainly on the former of these two Acts; because the latter does not impose any duty at all upon the license. I shall consider the 6 G. 4, c. 81, first, and by itself, in order to determine the effect of it, and what it proves.

The first section of this Act (6 G. 4, c. 81) repeals all former duties; and the 2nd section enacts, that new duties shall be paid; and by the schedule attached to that section, the duty to be paid by “every retailer of spirits,” whose premises are valued at £30, and under £40, is £8; and that to be paid by “every retailer of spirits, being duly licensed to deal in and sell coffee, tea,” &c., and whose premises are valued at the same rate, is £11. 11s. The body of the Act enacts, that all grocers shall be entitled to take out a license to retail spirits in any quantity not exceeding two quarts, and not to be consumed on the premises; and then the 13th and 14th sections authorise victuallers to get a license to retail spirits to be consumed on the premises. It appears to me, that there are two distinct retail licenses framed and contemplated in the Acts of Parliament which relate to the subject; one of them I shall call, for shortness sake, the victualler’s license, and the other I shall designate the grocer’s license; the former, for the sale of spirits to be consumed on the premises, and the latter, for the sale of spirits not to be consumed on the premises.

Now, I cannot understand how the question could have arisen on this part of the case, or what ingenuity could suggest the argument, that those who took their license under the 4th section of the 6 G. 4, c. 81, were not retailers of spirits, because they were not retailers of spirits under the 13th and 14th sections of the same Act. It would, as it appears to me, be a waste of words to argue such a point as that, because I think that the persons who come within the exceptions, are persons who have grocers’ licenses, and who took out the license described in the 4th section; that is, persons who took out licenses to sell spirits in quantities not exceeding two quarts, and to be consumed elsewhere than on the premises of such retailers. That appears to me to be the fair and plain construction of the clause itself—“Every retailer of spirits, being duly licensed as a grocer, and not selling spirits in any greater quantity at one time than two quarts, or to be consumed on the premises;” that is, the person who does not sell spirits to be consumed on the premises, gets a license for that purpose. The words of the 4th section make it more

distinct ; because they say, that the license which a grocer is to get, is "the license hereinbefore mentioned ;" and therefore, I take it that this is the license excepted to grocers, to sell spirits in quantities not exceeding two quarts, and not to be consumed on the premises.

It has been said, that this is too narrow a view of it ; and that we should read the exception as if it stopped at the word "pepper." But that appeared to me to be a wrong construction. "Every retailer of spirits ;"—why, they are not "retailers of spirits" until they got their licenses authorising them to retail them ; and then, following that up, we read—"Every retailer of spirits, who is licensed to sell coffee, tea, cocoa, chocolate and pepper, *and* not selling," &c. I see nothing to warrant me in striking out the word "*and*." I find the ordinary word connecting the two passages, and making the whole descriptive of that contained in the 4th section, which says, that the license means that the person who receives it shall be at liberty to retail spirits in quantities not exceeding two quarts, but that none shall be sold for consumption on the premises ; and for that license the schedule points out a specific duty. That duty is chargeable, not on the person, but on the license ; and the argument that goes to cut the clause into two, was founded on the terms of the 26th section. I admit that it was an ingenious argument ; but I must say, that it does not appear to me to be entitled to the value that has been ascribed to it. The 26th section says, "Every retailer of spirits in Ireland" (including among many others), "every retailer of spirits in Ireland being licensed to sell coffee, tea," &c., £100. It has been said, that that fortifies the position, that the description in the schedule does not embrace the latter part of the exception, but merely the former part, which is the definition of a grocer. I do not see how that position applies here ; but taking it as if it might be applied, what is the effect of the 26th section ? It means, every unlicensed person is liable to a penalty ; but if he is a grocer he must pay a penalty of £100 ; and in the information, it would be absurd not to describe him as "a grocer." The supposition, therefore, that because he was not licensed, he was subject to the penalty of £100, was founded on the mistake, that every dealer was licensed ; and if he be not, he is subject to the penalty if he violates the law ; and in every information which might be filed against him at the suit of the Crown, for the recovery of that penalty, care should be taken to describe him as "a grocer."

It therefore appears to my understanding, that this Act of Parliament authorises but two licenses—the general and the special ; and that under it, no other could be given ; and that one of them—viz., the general retailer's license, authorises the sale of spirits in any quantities under a gallon, to be consumed on or off the premises ; while the special license to a grocer authorises a sale of spirits in any quantity under two quarts,

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and not to be consumed on the premises; and that there are certain and specific rates of duty imposed upon them, and upon them only.

The next question is this—does the 6 & 7 *W.* 4, c. 38, impose the high rate of duty on the different class—viz., the grocer who cannot sell less than a pint? It abolishes the second class of retailers mentioned in the 6 *G.* 4, c. 81, and creates a new and different class. It does not affect the general license, nor, to my mind, does it affect the general class mentioned in the schedule; for no matter in what quantity he retails, he must be a retailer. It does, in my mind, therefore, create a new class of retailers; but my difficulty is, that it does not of itself impose any new duty. It appears to me to repeal the 6 *G.* 4, c. 81, in this respect, and to make a new enactment; and then embodying one with the other, which is the proper course to pursue in order to understand the law, it would run thus:—"No person in Ireland licensed to sell coffee, &c., nor any person "deemed a grocer under the excise laws in force in Ireland, shall be "entitled to take out the license mentioned in the 6 *G.* 4, c. 81, to sell "spirits in any quantity; nor any license to retail spirits on the premises, "nor within a quarter of a mile of his premises, other than a license to "sell less than a pint." That is the plain meaning of the law as it now exists; and then the other license shall be "null and void." That is the way in which I read that statute; and it, in my mind, repeals the 4th section of the 6 *G.* 4, c. 81, and makes this enactment in lieu of it, creating a new class of retailers of a totally different description from that mentioned in the 6 *G.* 4; and that class not falling within the description in the schedule imposing the high rate of duty, he does not come within that exception, although the new class may be said to be substituted for the old one, for police regulations only. It is said that the 6 & 7 *W.* 4 does not exonerate that new class from the payment of the duty. But that is not sufficient, because you must charge them with duty, or show that they were otherwise charged with duty. If it does not in clear language impose a duty, a duty cannot be charged; and I do not find that duty imposed, either in terms, or by necessary implication. I do not see any thing in the 6 & 7 *W.* 4 to authorise us to meddle with the schedule to the 6 *G.* 4; certainly not with the duty imposed upon retailers. Suppose that, instead of abolishing the former class, a new class had been added by the 6 & 7 *W.* 4, c. 38; and added without altering the schedule to the 6 *G.* 4; suppose, for instance, that it had enacted that any fruiterer might get a license for selling any quantity not less than a pint; that would create a new class of retailers, which would not fall within the 6 *G.* 4, c. 81, at all; and for two reasons: first, a fruiterer is not a grocer; and secondly, a pint is not two quarts. That class, therefore, would not be excepted, but would fall within the general provisions. If that be so, I cannot see any difference in principle between an added, and a substituted, class. In the same manner, reading, as has been suggested, the

3rd section of the 6 & 7 W. 4, c. 38, as if it followed immediately after the 4th section of the 6 G. 4, c. 81, they could not be said to support the exception contained in the second clause of the schedule; nor would there be any thing like it, or which could be said to come within it.

I do not, therefore, see that we, sitting here, have any authority whatever to interfere with the second clause of the schedule. It appears very probable that the framer of the 6 & 7 W. 4, c. 38, who was not providing for the revenue, but regulating the sale of spirits, might have overlooked what he was doing; but be that as it may, I do not see any provision in it subjecting this new class to this high rate of duty. I cannot see that provision which so many of my learned Brethren see. It is not conveyed to my understanding in unambiguous language; and therefore, upon established authority, I cannot see that the plaintiff here is bound to pay the excess of the higher above the lower rate of duty. I therefore am of opinion that the judgment of the Court of Exchequer ought to be reversed.

TORRENS, J.

In this case, I might feel satisfied to rest my judgment on the arguments which have been advanced, and with the view of the statutes taken by my learned Brethren Lefroy and Richards; but as I have with some care considered the question, I think it my duty to pronounce an opinion on the reasons which have led me to the conclusion at which I have arrived. I shall premise what I am about to say with this observation; that if I felt that a subject of the nation was about to be charged with a tax by doubtful words, or ambiguous language, it would be my duty to refrain from pronouncing a judgment which could tend to impose that tax on him, inasmuch as I hold the law to be, that in a case of that description, no subject should be charged with duty. But as I do not feel any of the doubts which have been expressed by some of my learned Brethren upon the subject, it is not my duty to yield my opinion in deference to theirs.

On these statutes, there are two distinct classes of persons referred to; one of them coming under the denomination of "grocer," and the other under the denomination of "publican;" and while it is stated, that every individual in the community is entitled to a license to follow that trade which he has selected, yet, as I take it, that proposition must be received with the qualification which the statute has annexed to it; and that qualification is, that the person taking out the license must comply with the conditions which are annexed to it by the statutes. Now, looking at some of the earlier statutes (*e. g.* 45 G. 3, c. 50), I find that there was a prohibition against a grocer having any such thing as a publican's license. He was, with others, declared incapable of holding that license; and if he obtained it, it was declared to be null and void. By this

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statute (45 *G. 3*, c. 50), therefore, and subsequent statutes passed in the 47th, 53rd and 58th years of the reign of *George the third*, the trade of a publican was preserved from encroachment, and a right established in him to demand and obtain his license on the performance of certain requisites; and by the last of them (58 *G. 3*, c. 57), the grocer is allowed to obtain that immunity which the publican had before, viz., to get a license on performing certain conditions, and under certain qualifications, but similarly restricted, as in the 6 *G. 4*, c. 81, to the sale of not more than two quarts. Thus, I find, in the 58 *G. 3*, c. 57, two classes of persons noticed by the Legislature as having a right to demand a license to sell spirits; and in tracing the history of those statutes down to the 6 *G. 4*, c. 81, the distinction between the two trades will be found to have been kept up. This brings me to the 6 *G. 4*, c. 81; because by it, the 58 *G. 3*, c. 57, and the subsequent statutes have been repealed.

By the 6 *G. 4*, c. 81, which is an Act applicable to both kingdoms, all the regulations of the former statutes are, as it were, preserved—[His Lordship here read the 2nd section of the 6 *G. 4*, c. 81].—Thus, this enactment transferred, so far as it did not repeal it, the whole power from the 58 *G. 3*, c. 57, to this Act, in order to keep the two trades separate and distinct. I have read this section, because on it I base the proposition, that a publican, *qua* publican, having performed all the necessary requisites, viz., going before a magistrate and obtaining his certificate, has a right to a publican's license limited to him; and the collector is authorised and required to grant it. That applies to publicans; but then arises the 4th section, which, in language equally stringent, puts the title of the other trader, viz., the grocer, and his mode of application, in contradistinction to the former, and keeps distinct and separate the license which each is entitled to demand. By the 58 *G. 4*, c. 57, and by this 6 *G. 4*, c. 81, the grocer is exempted from going before a magistrate, and excluded from obtaining this species of license; and he was so excluded, because he was in the nature of a fiduciary to the State, entrusted by them to sell a certain description of commodities, and in that capacity he was entitled to demand a license.

But then, what license was he entitled to demand? If the 6 *G. 4*, c. 81, stood alone, it would, I think, be plain, that a grocer applying for a license under it would have to establish his right, by showing that he had a previous license. Now, looking at the preambles and titles of these statutes, it would be impossible for a legal mind not to say, that we are to consider them as one code, and to be read together, except when they are inconsistent with each other. The 3 & 4 *W. 4*, c. 68, which is annulled by the 6 & 7 *W. 4*, c. 38, refers to the 6 *G. 4*, c. 81, as amending it. So that, although this statute of the 6 & 7 *W. 4*, c. 38, does not refer directly to the 6 *G. 4*, c. 81, it does through the 3 & 4 *W. 4*, c. 68; and that being so, let us consider how far these laws have been carried

out, so as to render as little mischievous as possible the result and consequence of a grocer dealing as a publican. When it is said, therefore, that a grocer gets a less beneficial license under the 6 & 7 *W.* 4 than he had under 6 *G.* 4, the reasons which influenced the Legislature to restrict him, as they have done, are of importance to be taken into consideration; and the very circumstance of the later statute prohibiting him from selling in such small quantities as he could under the 6 *G.* 4, shows that it was the intention of the Legislature to put an end to the mischiefs resulting to public morality from a combination of the two trades; and they therefore overrated the subject, by giving him less liberty than he previously possessed; but though they have done that by giving him, as it is alleged, a less valuable license, they leave him nevertheless subject to the same rate of duty.

But then, it has been said, that this is a distinct license, not heard of before, and an argument is founded on that assertion. It is not a publican's license, but a special license for liberty to sell spirits in quantities not less than a pint. Now, I asked, had the trader ever applied for such a license, or is there such a license known to the excise? The law says the grocer cannot have the same license which the publican may have, but if there is a license for the grocer at a similar, that is to say, the lesser duty, where do we find this lesser duty imposed? It is not created by any statute; and from the very circumstance of this not being a fiscal statute, it is not in the power of the Court to say that which the Legislature have not said, viz., that the license therein mentioned should be granted on payment of a lower rate of duty, than that which is imposed on it by the 6 *G.* 4, c. 81. The Court cannot do that; and, therefore, it is my opinion, that the judgment of the Court of Exchequer should be affirmed.

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PENNEFATHER, B.

I will not say that this is a case of doubt and ambiguity, but I must admit, that it appears to me to be a case of difficulty, because so many of my learned Brethren have differed in opinion on the question at issue from me; but we are not, on that account, the less bound to probe and examine the matter, and ascertain, if we can, whether a conclusion may not be come to, that is free from doubt. If that conclusion cannot be arrived at to our satisfaction—if our minds are not free from doubt and ambiguity—then I admit that the subject is not to be charged; but it is not because there may be a difficulty in ascertaining the objects of the Legislature, and in comparing the different clauses of the Acts which are brought under our consideration, that therefore we are to say that the matter on which we are called on to decide is left in doubt and ambiguity.

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The question here is, whether the plaintiff in this action, who has taken out a grocer's license, for which he has paid 11s. 6½d., and who has tendered to the collector of excise the sum of £8. 16s. 6d., is entitled to the spirit retail license particularly mentioned in the special verdict, and which retail license is that which the statute of the 6 & 7 W. 4, c. 38, s. 3, specifies—Whether he is entitled to that license on the payment of the sum tendered? He alleges that he is entitled to it, because he is, or would be, a retailer of spirits, and a general retailer's license is subject only to that duty; and also, that he is not within the exception contained in the 6 G. 4, c. 81, and, therefore, not liable to the amount of duty imposed on grocers' retail spirit licenses by that schedule.

Now, the difficulty in this case arises from the nature of the license having been changed by the latter statute of the 6 & 7 W. 4, c. 38, s. 3. I do not conceive, however, that any new class of retailers has been introduced by that statute of the 6 & 7 W. 4. I conceive that the old class remains the same as under the 6 G. 4, c. 81; that the terms of the license are regulated and restricted—if you will, by the statute; but no new class of retailers has been introduced. I am quite willing to admit, with the plaintiff, that the license mentioned in the 6 & 7 W. 4 is a less beneficial license than the one mentioned in the 6 G. 4, c. 81; but, while I admit, I am bound also to say that he must pay the same amount of duty for it, as he paid for the more beneficial one granted to him by the 6 G. 4, c. 81; because it appears to me, that the higher rate of duty, mentioned in the latter part of the schedule of that Act—I mean the exception—is to be paid by *all* grocers who say that they are entitled to licenses, and that is not confined to grocers selling the quantity of spirits mentioned in the schedule.

The excise laws, as I understand them, in Ireland, have treated with two classes of traders with regard to the spirit licenses, viz., “publicans” and “grocers.” They are both retailers, it is true, but the policy of the Act has been to treat them as distinct classes, distinguishing the grocer from the publican, but not taking any distinction as to the quantity which either of them may sell; and that, I think, is the clear meaning of the different Acts of Parliament, commencing with those referred to with so much precision by my learned Brother Richards, and ending with the last one now under consideration. The different Acts say at one time, that a grocer shall not sell spirits at all: and at other times, they say that grocers may sell spirits, under certain restrictions, not to be consumed on the premises, and not under two quarts;—that is the provision contained in the 58 G. 3, the Act which was in existence immediately before the passing of the 6 G. 4, c. 81. I make this observation as furnishing, in my mind, a clue to what the Legislature intended by the 6 G. 4, c. 81; and it appears to me, with great respect for those who entertain a different

opinion, that the schedule of the 6 G. 4, c. 81, comparing it with the enactment, and the different sections of the Act, is to be taken in the excepting clause, as relating to grocers generally, and not to grocers of any particular description, or selling any quantity of spirits. I use the word "grocer" for brevity; for vendors of coffee, tea, cocoa, chocolate or pepper, are defined to be grocers; and I would read the schedule which is thus worded: "Every retailer of spirits in Ireland, being duly licensed to trade in, vend, and sell coffee, tea, cocoa, chocolate and pepper." I would read it thus, "Every retailer of spirits in Ireland, being a grocer, shall be rated according to the value of his house, and shall pay for the license which he gets the sum mentioned." I come to that conclusion, partly for the reasons which I have stated, and partly from the consideration which I have given the provisions, and the meaning, of the Act of Parliament. It was intended here to regulate the amount of the sums to be paid by grocers, and other retailers, and not, in this part of it, to define the nature of the licenses, which are defined by substantive and distinct clauses of the Act of Parliament; and therefore, my understanding of it is this: that a grocer shall be liable, on getting a license, according to the terms of that license, to the payment of the duty mentioned in the margin of that schedule, which duty is regulated according to the value of his house.

I am perfectly aware, that the words of the Act begin in the second clause, "Every person who intends to become a retailer;" for he is not a retailer of spirits within the meaning of the Act, until he gets his license. If he has not the character of a grocer, he cannot get the license; he must go first, and get the magistrate's approval, and then he becomes entitled to his publican's license; but every grocer, when he becomes a retailer of spirits, shall pay the sum which is imposed on him according to the value of his house: and he shall be entitled to get his license on the payment of that sum; and then comes the 4th section, which describes again the nature of the license he is to get. That 4th section says, first, "all persons who shall be duly licensed under this Act to deal in, or sell, coffee, tea, cocoa, chocolate and pepper, shall be deemed grocers." It then goes on to confer liberty on the grocer to sell spirits "in any quantity not exceeding two quarts, and to be consumed elsewhere than in the house, or on the premises of such retailer." So that I think, if attention be paid to what must have been the intention of the Legislature, it can hardly be supposed, that they meant to use such loose terms, as to make part of the definition of the persons who were to get the license, the quantity which they are to sell. The words are "selling spirits." Was that immediately before getting the license, or in what other manner? It was mentioned here (with great respect for those who framed the Act) unnecessarily; because the nature of the license is described in the 3rd section of the Act, and the precise persons to get

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that license are grocers, not coupling them with any other qualification; and then, in the subsequent clause, those on whom the penalty is inflicted are persons acting as grocers, and it uses the terms and phrase of dealing in coffee, tea, cocoa, chocolate and pepper; namely, those which the preceding section has defined to be "grocers," without any other restriction whatever.

That is the view I take of this Act of Parliament; and then we come to the 3rd section of 6 & 7 W. 4, c. 38; and here I must observe, that the construction which I put on the 6 G. 4, c. 81, is, I think, justified by the words used in the 6 & 7 W. 4, c. 38: that clause, when it comes to make an alteration in the license, and, with great respect I say it, not to introduce any new class of persons, but to regulate the license which the grocer formerly possessed, does not use the words which are contended to be part of the definition; but it uses the words—"who shall be duly licensed under any Act to sell coffee, tea, &c., or any person deemed a grocer within the meaning of the excise laws in force in Ireland, at or immediately before the passing of this Act;" that is, the person on whom the 6 & 7 W. 4 means to operate. "Grocer" is the word used in this Act, and not a grocer limited as to quantity or place, but "*no grocer* shall be entitled to take out *any* license to retail spirits on the premises, unless in quantities of not less at any one time than one pint," &c. This is not a fiscal Act; it is an Act of regulation; it does not make any mention of the duty to be paid, but it professes to regulate the license which the grocer previously had, or was entitled to get in future, by express enactment, and less beneficially (if you please) to him, than that which he formerly had under the previous Act. It deals solely with the license, and it says, that "the grocer" shall not be entitled to any other license. It does not say, affirmatively, that "he shall be entitled to that license;" but it says, he shall *not* be entitled to any other license. Must not that refer to an Act of Parliament which entitled him to some other license? And this action could not be maintained on this clause *alone*, without recurring to the 6 G. 4, c. 81; and it is only by taking the two Acts together that the plaintiff's title to maintain this action can be sustained.

Then, if we take the two Acts together—the grocer, by the 6 G. 4, c. 81, is entitled to a license of a certain kind on paying duty. The plaintiff himself says:—"By virtue of that Act I am entitled to that license; but I am entitled to that license modified by the 6 & 7 W. 4, c. 38, s. 3." He rests his claim on the provisions of the 6 G. 4, by which alone, and affirmatively, the right to a license is given to him; but he adopts the negative words of the 6 & 7 W. 4, which says he shall not have a license unless that described in the latter statute; he avails himself of that, and comes into Court, demanding that which he could not have unless as a

grocer retailing spirits, under the second clause of the schedule of the 6 G. 4, c. 81, and the first section of that Act.

It has, I think, been fairly put by one of my learned Brethren, that this section may be read as a proviso, introduced into the statute of 6 G. 4, c. 81; and then I would read it thus:—"Every grocer shall be entitled to a license to sell spirits in quantities not exceeding two quarts, until the year 1836; and from and after 1836, he shall be licensed to sell spirits in quantities of not less than one pint, and according to the other restrictions mentioned in the 6 & 7 W. 4, c. 38, s. 3; and the duty is payable by him on getting the license to which he is entitled." He gets that license for ten years in one certain form, and subsequently in another form; but he gets it subject to the payment of the duty, in which no alteration has been made. That appears to me to be the construction which might be put on these two Acts of Parliament. I think it impossible to say that one is not an amendment of the other, or that the intention of the Legislature was to do more than alter the form of the license, and the matters to be done by the grocer. That the Legislature did not, by this Act, alter the fiscal duties, is not to determine the question; for although the Legislature does not intend altering the duties, yet they have so *bungled* the matter—they have legislated in such a way, that sense or meaning cannot be extracted from their Acts in this respect; and although they did not intend to affect the duties payable by the Queen's subjects, yet they have legislated in such a loose manner, that I do not in the least wonder at the confusion which has arisen here. It is true, they intended to regulate trade, and the manner in which trade should be conducted; and not in any manner to interfere with (as it appears to me) the duty already imposed by a former statute; and we ought not to attribute such an intention to them unless we are coerced, if sense and consistency can be given to their enactments. We ought to investigate every part of these statutes, in order to see how far they can exist together, and not to attribute to the Legislature a meaning which they could not possibly have intended, thereby doing an act affecting the rights of the Crown, contrary to their intention.

I was much struck by an observation made by one of my learned Brethren, with regard to the operation of the 3 & 4 W. 4, c. 68. That Act regulated the trade of the publican in a manner which is very detrimental, in a pecuniary point of view, to the parties; and yet it is not pretended that the Act of Parliament repealed the duty payable on their licenses; and has not the same been done substantially in the same way here? The Legislature has introduced, where perhaps it ought not to have so done, as part of the description of the person who is to have the license, the duties to be performed by him on getting the license. It is not a correct way of legislating; but yet it has done so; and by an awkward phrase, has given rise to the position, that it formed part of the

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description of the person applying for the license. If, instead of doing so, they had left it in the 4th section of the 6 G. 4, c. 81, the difficulty in the present case would not have arisen. But, to my mind—awkward and clumsy as the legislation here is—it appears they have done no more than describe the nature of the license, and the duties to be performed by the person taking it, leaving the duty payable on that license untouched.

These are the views which ought, in my opinion, to be taken of the case. I cannot say that I entertain doubts on the subject ; but I think there are difficulties. Doubts of my own judgment I must have, as so many of my Brethren have differed from me ; but nevertheless, I cannot say that I view the case with doubt.

On the whole, therefore, I am of opinion, that the judgment of the Court of Exchequer ought to be affirmed.

BRADY, C. B.

This is an action brought by the plaintiff Dickson against the defendant George Pape, who is the collector of excise for the Dublin district, to recover back from him a sum of money, which the plaintiff alleges he paid to him in his (the plaintiff's) own wrong and on compulsion. That being entitled by law to demand at his hands the license set out in the special verdict, which license he was entitled to have on certain terms, but which he was compelled to take on higher terms than those warranted by law, he is by this form of action to get back the excess. His right to get that license has been conceded. The acts of the parties here appear to me to recognise that right ; for the defendant himself made no objection to the plaintiff's demand, but that he was to have for it a certain sum of money, and he agreed to grant it on receiving that sum of money. Thus he conceded his title to the plaintiff, and therefore, the question here, is not the title to get that license, but the terms on which it is to be had.

The established principles of the law, and the constitution of this country, are, that trade is absolutely free ; that it is the right and title of every member of the community to embark in any trade or business he may think fit, and carry it on as he likes, provided he do no injury to the community by so doing ; and it rests with those who wish to embarrass him with conditions and restrictions, to establish both ; and the Legislature here, whose power to impose duty and restrictions on the subject is unquestioned, has, in dealing with the fiscal duties contemplated by this Act, declared that grocers were to be marked out by a certain license, granted for that purpose ; and the moment that license is defined, the trader's right and title to that license is unquestioned. He had a perfect right to carry on his trade without it ; and therefore it is, in my mind, a mistake to suppose that these Acts require words declaring

the party entitled to the license he seeks. It is the duty of the Legislature, when they impose licenses, to define them; and when the license is defined, the right of the party applying for it, the right of the party who is willing to comply with the terms of it, and to become subject to its conditions, cannot be questioned; and the officer whose duty it is to grant that license has no discretion given him, but he is bound to give the license to the party who applies for it, and who has a title to get it. The expressions are coequal. There can be no conditions given to one party to grant, that do not imply a title on the other to receive. The party applying had as clear a title to get his license, as he had before the Act passed, and to carry on his trade free as air; and therefore, it appears to me, as I have already observed, that it is a mistake to suppose that it is on the words of the enactment that his title rests. It rests on no such thing; the party applying for a license is a person who is by law prohibited from carrying on a certain trade, except under a particular license. That license is defined; and his title rests then on his being the person who may trade under that license, for which he applies, that he may so trade; and if there is no discretionary power vested in the person whose duty it is to grant that license, the party is entitled to get it, and it cannot, and ought not to be, withheld from him. With respect to publicans' licenses, there is a discretionary power vested, not in the officers of excise, but in certain other persons, viz., the magistrates; and the excise officers have not, that I am aware, any discretionary power to grant or withhold those licenses, upon proper application being made for them, all the necessary requisites having previously been performed, of which the magistrates are the judges, the officers having, as I have said, no control.

Well then, the statute of the 6 *G.* 4, c. 81, embodies the common law of the land on this subject; because it provides, that "Every excise license which is authorised or required to be taken out by this Act, as shall be granted, &c.; and every collector or other person having charge of the collection, and supervisor, as aforesaid, is, and are hereby respectively authorised and required, to grant and deliver every such license to the person or persons who shall apply for, and be legally entitled to receive the same forthwith, on the payment of the duty imposed, free of all poundage, fee, gratuity, or any other payment whatsoever" (6 *G.* 4, c. 81, s. 6). Now the 6 & 7 *W.* 4, c. 38, has declared most clearly that a person deemed a grocer "is entitled to get a license to retail spirits on his premises in quantities of not less at any one time than one pint;" but in granting him that liberty, it was thought proper to restrict him, so as that he is not allowed to sell any spirits for consumption on his premises; and being so entitled to this license, the collector of excise is bound to give it to him on the payment of the duty, and he cannot withhold it from him, the common principles

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of the law entitling the grocer to get it ; and there is no authority vested in the collector, or any other person, warranting a refusal, or a withholding of it. Therefore, instead of the grocer going back to the 6th of *G. 4*, c. 81, to show his title to the license which he claims (as my Brother Lefroy argued), it is the Crown must go back to that Act, in order to establish their title to the terms they insist on being complied with before they give him the license. The collector is bound to give him the license he demands, on the terms of paying the duty imposed on it, and therefore it is for the Crown to make out their right to that which they demand. They insist, that there is money payable to them, and it is not for the grocer to go back to that Act, to found a title on it, that title being recognised by the Act which defines his license, and under which he applies ; but it is for the Crown to go back to that Act, and establish their right under it, if they can, to that which they demand. That I take to be an answer to some of my learned Brethren, who have advanced that argument in pronouncing their opinions on this case. Well then, the collector being obliged to go back to the 6 *G. 4*, c. 81, in order to establish his right to the duty which he demands ; and that he must go back to it is beyond any doubt whatever, because this Act of 6 & 7 *W. 4*, c. 38, does not give him one farthing ; for if this Act had repealed the other, the plaintiff here would be entitled to get the license which he claims, without paying one sixpence. It consequently rests with the collector, to show what amount of duty he is to receive for the license which he is required to grant ; and in order to do that, he must, as I have already observed, go back to that Act, which, as he alleges, imposes the duty, which he insists it is his right to demand. I will, therefore, go back to the 6 *G. 4*, c. 81 ; and here, I must observe, that it does occur to me that there is a misconception, or a misapplication of the terms of this Act, on which the decisions of some of my learned Brethren have been founded. By the 6 *G. 4*, c. 81, there were several regulations, with respect to grocers, enacted ; and as pointed out by my learned Brother Richards, they were prohibited from dealing with spirits until the 58 *G. 3* ; and if this Act had done no more than repeal the provisions—the prohibiting provisions of that Act—he would be entitled to take out a license to retail spirits, not to be consumed on the premises ; and so the matter stood until the passing of the 6 *G. 4*, c. 81. Now, it has been said, that the 6 *G. 4*, c. 81, contemplated only two classes of spirit dealers. In my mind, that is a mistake ; for under the head of “ Every retailer of spirits,” it not only comprehends those who sell spirits as a grocer, but all classes of retailers. A grocer in England takes out a spirit license, but he cannot sell one drop to be consumed on his premises, unless he has a retail beer license ; and therefore, when the 6 *G. 4* imposes a duty on “ Every retailer of spirits,” it is quite a misapplication of its terms to say that they are alluding to publicans ; they allude to every

person who retails spirits ; and if the 6 G. 4, c. 81, had stopped there in the schedule, and had contained the 4th section, a grocer would get his license, paying the same duty as is imposed on " Every retailer of spirits ;" and if it was worth any one's while to carry on the trade of a retailer of spirits, without the power of allowing it to be consumed on the premises, he could get a grocer's license for 11s. 6d $\frac{1}{2}$. Therefore, the words, " Every retailer of spirits," are not pointed at publicans solely and alone, nor is it compulsory on the person mentioned here, to take out either the publican's, or grocer's license ; and it is a mistake to suppose that he was bound to do so : because there are three licenses, to any one of which he is entitled, on performing the necessary requisites—the publicans' licenses pointed at by the 13th and 14th sections ; and the grocer's license is another. But beside these two, there is the man who is neither publican nor grocer, and what is to prevent him from carrying on the trade mentioned here ? There is no provision against his doing so, that I have seen or heard of.

Well, the 6 G. 4, c. 81, imposes duties on particular licenses ; and now, let us see, what are the licenses upon which those duties are imposed ? and in considering this part of the question, I must say, that I cannot read these words, " other persons," as applicable to grocers—on the contrary, I read them, as having reference to retailers, as applying to publicans. Then again, what is the meaning of the exception, " Every retailer of spirits hereinafter mentioned ?" It means, the excepted persons who retail spirits in Ireland, in quantities not exceeding two quarts at any one time ; and not a grocer by virtue of his position as a grocer, " who shall be duly licensed to trade in, sell and vend coffee, tea, cocoa, chocolate and pepper." If the Act stopped there, it would require this license as a qualification, or as a condition annexed to his obtaining the spirit retailer's license : but I cannot consider it in that point of view, when I look to the 4th section, because it runs thus, " That all persons who shall be duly licensed," &c., shall be deemed grocers, and shall be entitled to take out the license hereinbefore mentioned, to retail spirits in quantities not exceeding at any one time two quarts. That is the thing described—that is the definition of the words in the schedule, plainly showing that the license is not confined exclusively to a grocer, *qua grocer*, but to this class of dealers, that is to say, " Every retailer of spirits in Ireland, not selling at any one time more than two quarts of spirits." Then the question comes round to this ; does the plaintiff here claim that license ? He does not ; and for the best possible reasons, viz., that he cannot get it ; and if he did get it, it would be null and void. But he claims what the law gives him ; and unless there is a special duty attached by law to the license which he demands, I cannot see what right the defendant has to demand from him this excess of duty.

The 26th section has been alluded to, but I find nothing at all in that section about the license. That section is conversant about the penalties

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only ; and if a trader violated the law, I do say that the penalty given by that section could be enforced. I am familiar enough with excise informations ; and an information on this subject would be a very short thing indeed, viz., "that Mr. Dickson, being duly licensed as a grocer, licensed "to deal in and sell coffee, tea, &c., and being deemed a grocer, &c., "did sell spirits without the license in that behalf required." That would be a short information indeed ; and I do not see any difficulty in applying that section to grocers taking out a license under this new Act. But if the Crown says, "we cannot get a penalty," my reply would be, I cannot assist you ; you must amend the Act. I, for one, however, cannot see where the difficulty exists, in applying that section to grocers licensed under this Act, as well as to grocers licensed under the former Act of the 6 G. 4, c. 81.

With respect to putting additional restrictions on the licensed party, and that in consequence the party is to get his license for nothing, it does occur to me, that it is a position that cannot be sustained, particularly looking at the case of *The Attorney-General v. Lockwood* (a). On the whole, I confess that my mind has not gone with Baron Richards. My opinion is, that the plaintiff here, by the language of the 6 & 7 W. 4, c. 38, and the common law of the land, applicable to that, is entitled to his license on paying a duty for it. What that duty is, it lies on the Crown to show ; and to do that, they must go back to the 6 G. 4, c. 81, where there is nothing to warrant them in demanding or receiving more than the retailer's duty. My opinion, therefore, is, that the judgment of the Court of Exchequer ought to be reversed.

DOHERTY, C. J.

I think the judgment of the Court below ought to be reversed ; and I come to this conclusion, not from being able to pronounce that, in my opinion, that Court was mistaken in its interpretation of the statutes, but simply on this ground, that after an anxious and diligent consideration of these statutes, I find the language so obscure, and the meaning so doubtful, that I cannot say with any degree of certainty which it is, the higher or the lower rate of duty, that the Legislature intended to impose.

It is a settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a tax on the public will be critically construed with reference to the particular language in which they are expressed ; and when there is any ambiguity discovered in them, the construction must be in favour of the public ; because it is a general rule, that when the public are to be charged with a burden, the intention of the Legislature to impose that burden must be explicitly and distinctly shown.

(a) 9 M. & W. 390.

Now, can it be asserted that by these two statements there is a clear, explicit, and distinct announcement, which it is, the higher or the lower duty, that is to be imposed? Were I at liberty to conjecture on the subject, I should concur with the majority of the Court of Exchequer, in thinking that it was the intention to impose the higher duty; but I feel that where clauses imposing duties are so ambiguously and so obscurely worded, the safer course is to give an interpretation in favour of the subject; and for this short and simple reason (assigned by Mr. Justice Heath in a somewhat similar case), "that the Legislature is always at hand to explain its own meaning, and to express more clearly what has been obscurely expressed."

Now I fully admit that the Legislature is not to be called on to interpose in every case of a merely suggested difficulty, or doubt, on the part of an individual. It has been truly observed, "that it would be quite visionary to expect in any code of statute law, such precision of thought, and such perspicuity of language, as to preclude all uncertainty as to the meaning." I am aware that various and discordant readings of statutes will arise in progress of time; and I am but too conscious that this may arise as often from want of skill and talent in those who construe, as in those who make, the laws; and therefore, in any case in which a difficulty and doubt occurred to my own mind alone, I should be slow to suggest the necessity for legislative interference. But when, in this case, the doubts which have occurred to, and perplexed me, are strengthened by finding that there was a difference of opinion among the members of the Court below,—that after full argument and mature consideration, up to this morning, five members of this Court were of opinion that it was the higher, while the remaining five were inclined to think that it is the lower, duty which is payable, it can hardly be asserted, that the language which gives rise to such a difference of opinion among the Judges (habituated as they are to the consideration of such subjects) is clear and unambiguous, as it ought to be; and if it be not the lower duty which is payable, but if the subject is to be charged with the higher duty, it is, in my opinion, a fit case for the Legislature to explain its own meaning, and to express more clearly what has, it is obvious, been obscurely expressed. I am, therefore, of opinion, that the judgment of the Court below should be reversed.

PENNEFATHER, C. J.

The question to be decided is shortly this,—whether the plaintiff, on taking out the license in question, is bound to pay the sum of £12. 2s. 6d., or the smaller sum of £8. 16s. 6d? I do not go into the facts of the case, as they have been fully laid before the Court already. It lies on the defendant, who represents the Crown, and claims the larger duty, to establish his right to it. If the right to the

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thing claimed be not clear, or be uncertain, that is sufficient to induce the Court not to grant it; and if it be the intention of the Legislature, nevertheless, that the larger duty should be payable, the Act should be explained and amended. In *Proctor v. Mainwaring* (3 B. & A. 146), Abbott, C. J., in giving judgment, says—"This being a penal clause "in this Act of Parliament, must not be extended by construction; and "though there may be cases falling within the mischief intended to "be prevented by the Legislature, yet if they have not used proper "words, so as to include them within the prohibition, it is not com- "petent for the Court to extend the Act of Parliament to them by con- "struction;" and in *Henderson v. Sherborne* (2 M. & W. 236), Lord Abinger, speaking of this passage, says—"The principle extracted from "Lord Tenterden, 'that a penal law ought to be construed strictly, " 'is not only a sound one, but the only one consistent with our free " 'institutions.'" The same principles are also recognised in the *Attorney-General v. Lockwood* (9 M. & W. 390); and therefore, the Crown is not to have the greater duty unless clearly entitled to it.

The 6th *G.* 4, c. 81, and the schedule annexed, with the 4th section, would give the larger duty, £12. 2s. 6d., on a license enabling the party to sell by retail in quantities not exceeding two quarts at a time, with certain other restrictions; but the 6 & 7 *W.* 4, c. 38, s. 3, provides, that after the passing of that Act, no person in Ireland, who shall be duly licensed under any Act, to deal in coffee, &c., shall be entitled to take out any license to retail spirits in the house, or on the premises, in quantities less than a pint, &c.; and any license to be granted to retail spirits in any other manner, to any such grocer, or per- son licensed as aforesaid, shall be absolutely null and void. .

Now, it is said, that a license containing the *minimum*, is not the same license as that mentioned in 6 *G.* 4, which contained the *maximum*, which such retailer could sell, and may not be, and probably was not, so beneficial for the retailer, yet that it was not intended to alter the duty, but only to introduce certain regulations in the retail spirit trade carried on by grocers. But is this so very clear? I certainly cannot feel it to be so, considering that the 6 & 7 *W.* 4, is not a fiscal Act. For that reason, without going further, I consider that the Crown has not succeeded in its title to the £12. 2s. 6d.; and therefore, that the judgment of the Court below ought to be reversed, as complained of, with moderate costs.

Judgment reversed.*

* BURTON, J., and CRAMPTON, J., were absent.

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EDMOND CONWAY and PATRICK LYNCH, in Error,

v.

THE QUEEN.*

(*Queen's Bench.*)

Jan. 13, 23.
 May 2.

ERROR.—This case came before the Court upon a writ of error from the Assize Court of the county of Limerick. The record set forth an indictment for murder, found at the Spring Assizes of the year 1843 against Edmond Conway and Patrick Lynch; that they were arraigned at the same Assizes, and severally pleaded not guilty: that issues were joined by the Crown upon those pleas, and a Jury called to try the same; that the Jury accordingly came, but that the issues remained untried at those Assizes, and the prisoners were remanded for trial at the then next ensuing Assizes; that subsequently—namely, at the Summer Assizes of 1843 for the county of Limerick—the prisoners were placed at the bar before the presiding Judges; that a Jury was called and came (and as before), that the issues so knit remained untried at those Assizes, and the prisoners were again remanded for trial at the next ensuing Assizes.

The record then set forth the proceedings at the third Assizes, viz., the Spring Assizes of the year 1844; that the prisoners were again placed at the bar for trial upon the issues so previously joined; and that thereupon the prisoners pleaded severally two pleas.

The first plea put in by Edmond Conway was as follows:—

“And thereupon the said Edmond Conway being brought, &c., saith, “that our said Lady the Queen ought not further to prosecute the “above-mentioned indictment against him the said Edmond Conway, “because he says, that heretofore, to wit, on the 2nd of March 1843, at “Limerick, in the county of Limerick aforesaid, at an Assizes then and “there holden, in and for the said county of Limerick, before the Right “Honorable Nicholas Ball, one of the Justices of, &c., and the “Honorable Joseph Devonsher Jackson, one of, &c., being then and “there the Justices duly assigned to hold the Assizes in and for the said “county of Limerick, the Jury of the Jurors whereof mention is within “made, being then and there called, and then and there come, and there- “upon (Jury named), twelve of the Jurors last aforesaid, were then and “there duly called, and did then and there answer to their names respec-

A Jury charged with the trial of persons indicted for a capital offence, having remained enclosed for a considerable time to consider their verdict, returned into Court and intimated to the Judge that there was no likelihood of their agreeing, who thereupon discharged them without consent and without objection on the part of the prisoners, or of the Crown, and without any fatality having occurred, and remanded the prisoners. The prisoners being again indicted at the following Assizes for the same offence, put in pleas in the nature of plea *puis darrein continuance*. The Crown replied, and the prisoners demurred to the replication; *Held*, that the demurrer should have been

allowed, and that the Judge had no discretion to discharge the Jury unless a case of evident necessity had existed.

Held also—That if such necessity existed, an entry of the facts establishing such necessity should have been made on the record. (CRAMPTON, J., *dissentiente*).

- * This case is printed out of the usual order, owing to its great importance.

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"tively, and were then and there duly sworn and empanelled to try the
 "issue above knit between our Sovereign Lady the Queen, and the said
 "Edmond Conway ; and the Jurors so sworn and empanelled were then
 "and there duly charged with the said Edmond Conway, who was then
 "and there duly given in charge to the said last-mentioned Jurors so
 "sworn and empanelled as last aforesaid ; and the said Stephen Seed, Clerk
 "of the Crown, &c., did then and there produce divers, to wit, ten wit-
 "nesses for and on behalf of our said Lady the Queen, who were then and
 "there duly sworn, and who then and there gave evidence to the said Court,
 "and to the said Jury so sworn and empanelled, and charged with the
 "said Edmond Conway, touching the said supposed felony and murder
 "aforesaid ; and the said Edmond Conway further says, that the said
 "Jurors so sworn and empanelled as last aforesaid, were then and there,
 "and after they were so charged with the said Edmond Conway, as last
 "aforesaid, discharged of him the said Edmond Conway, not by reason
 "of any fatality or misconduct, or request of him, the said Edmond
 "Conway, or for or by reason of any fatality of them, the said Jurors so
 "sworn and empanelled, as aforesaid, or of any of them ; or for or by
 "reason of any accident to or infirmity, or illness of them the said Jurors
 "so sworn and empanelled as last aforesaid, or of any of them ; or of the
 "said Justices, or of either of them, or for or by reason of any other
 "sufficient or legal cause whatsoever ; and this the said Edmond Conway
 "is ready to verify : wherefore he prays judgment, and that he may be
 "dismissed by the Court here from the premises in the said indictment
 "mentioned, and that the same may not be further prosecuted against
 "him, the said Edmond Conway.

To this plea the Crown replied as follows : " And the said Stephen
 "Seed, clerk, &c., who prosecutes, &c., comes, and protesting that the said
 "plea of the said Edmond Conway ought not, &c., for replication,
 "nevertheless, to the said plea, the said, S. S. clerk, &c., says that our
 "said Lady the Queen ought not to be barred from further prose-
 "cuting the said indictment, nor ought the said Edmond Conway to be
 "discharged, or go without a day, for or by reason of any thing in said
 "plea alleged, because he says, that at and after the time of the
 "swearing and empanelling of the Jurors in the said plea mentioned
 "and named, and at and after the said time of the giving in charge of
 "the said Edmond Conway, as in his said plea is above mentioned, and
 "before the said Jurors in said plea mentioned were discharged of him
 "the said Edmond Conway, to wit on, &c., at, &c., in said plea men-
 "tioned, divers, to wit, thirteen witnesses (naming them), then and there
 "in open Court, in the presence of the said Justices in said
 "plea named, and in the presence and hearing of the said Jurors
 "and of the said Edmond Conway in open Court, were, and each of
 "them were then and there duly sworn upon their and each of their

“ oaths respectively, true evidence to give between our said Lady the
 “ Queen and the said Edmond Conway, touching and concerning the
 “ said felony and matters in the said indictment contained; and the
 “ said several witnesses being so sworn, were afterwards then and there
 “ examined, and gave evidence upon their oaths respectively, in the
 “ presence and hearing of the said Justices, and of the said Jurors, and
 “ of the said Edmond Conway, in the said open Court, then and there
 “ being at the Assizes aforesaid in said plea mentioned, and said several
 “ witnesses then and there gave evidence upon their oaths respectively,
 “ for and on behalf of our said Lady the Queen, in said open Court,
 “ in the presence and hearing of the said Justices and of the said
 “ Jurors in said plea mentioned, and in the presence and hearing of the
 “ said Edmond Conway, then and there in the said open Court being
 “ present, touching, and of and concerning the said felony in said
 “ indictment mentioned; and that divers, to wit, four witnesses
 “ (naming them), then and there in said open Court, &c., were
 “ duly sworn, &c., and were, and each of them was duly examined,
 “ &c., and the said S. S., &c., further saith, &c., that the said last
 “ mentioned witnesses who were, &c., were the only persons produced
 “ or tendered as witnesses or witness to give evidence for or on behalf
 “ of the said Edmond Conway, touching or concerning the said felony
 “ or matters in said indictment mentioned, or any of them, and that all
 “ the evidence then and there or at any time produced, or tendered, or
 “ offered, by or on the part or behalf of the said Edmond Conway, to
 “ or before the said Justices, or either of them, or to or before the said
 “ Jurors so empanelled, as in said plea mentioned, was duly heard and
 “ received by the said Justices in said plea named, then and there pre-
 “ siding in the said Court, and by the said Jurors, and was by the said
 “ Justices afterwards then and there duly left and submitted to the con-
 “ sideration of the said Jurors; and that the said Edmond Conway
 “ then and there declared in said open Court, in the presence of the
 “ said Justices and of the said Jurors so empanelled as aforesaid, that
 “ he the said Edmond Conway had not further or other evidence to
 “ offer or produce to or before the said Court, or the said Justices, or
 “ the said Jurors, touching, or of or concerning said felony and matters
 “ in said indictment mentioned, or any of them; and the said S. S.,
 “ clerk, &c., further saith, that after all the said several witnesses
 “ being so as aforesaid duly sworn and examined in said open Court,
 “ had then and there given their evidence as aforesaid, before and in
 “ the presence of the said Justices and of the said Jurors so empa-
 “ nelled as aforesaid, and in the presence of the said Edmond
 “ Conway, and after the said Edmond Conway had so as aforesaid
 “ declared that he had not any further or other evidence to produce or
 “ offer to or before the said Court, or the said Justices, or the said

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" Jurors, to wit, on the same day and year and place in said plea mentioned, the said Jurors being so charged, and having heard the said evidence, were then and there in the presence and hearing of the said Edmond Conway duly charged by the said Justices then and there presiding in said open Court, touching and concerning the felony and matters in the indictment aforesaid mentioned, and the issue joined thereon between our said Lady the Queen and the said Edmond Conway ; and afterwards the said Jurors then and there by the directions of the said Justices retired from the said public Court into their private Jury-room adjoining the said public Court, for the purpose of considering and deliberating in private upon their verdict, and that the said Jurors then and there and from thenceforth remained and continued in their said private room, separate and apart from all other persons, and without meat, drink or fire, or other refreshment being had or received by the said Jurors, or any of them, for a long space of time, to wit, for twenty-four hours thence next ensuing ; and that afterwards and after the said Jurors had so retired, and after the lapse of much more than sufficient and reasonable time for enabling the said Jurors to consider and fully deliberate upon their verdict, touching the said felony and matters in said indictment mentioned, and to agree upon their verdict, in case they could have at all agreed together touching or respecting the same, to wit, after twenty-four hours had elapsed from the time of their so retiring from the said public Court into their said private room as aforesaid, to wit, on the 3rd day of March, in the year of our Lord, 1843, being the day next after the said day on which the said Edmond Conway was so given in charge to the said Jurors, as in said plea mentioned ; the said Jurors in said plea named, then and there came from their said private Jury-room into said open Court, and then and there in said open Court, at said Assizes, there declared to and before and in the presence and hearing of the said Justices, and in the presence and hearing of the said Edmond Conway, then and there being present in said open Court in the County of Limerick aforesaid, that they the said Jurors had not agreed upon their verdict, and that they the said Jurors could not agree together upon any verdict upon or touching or concerning the said indictment, or issue, or any of the matters therein contained ; and that they the said Jurors had not agreed together nor found, and that they could not agree together, or find, or say upon their oaths whether or not the said Edmond Conway was guilty of the said felony or matters in the said indictment mentioned, or any of them ; and that afterwards, and after the lapse of said time, being more than a reasonable time, as aforesaid, for the said Jurors considering and deliberating upon their said verdict, and after the said Jurors had so declared to the said Justices in said open Court, and in the presence of the said Edmond Conway as aforesaid, that they

“ the said Jurors had not agreed to their verdict, and that they could
 “ not agree together upon any verdict on the said indictment, the said
 “ Justices then and there presiding at the said trial in the said open
 “ Court then and there, without any objection being made by or on behalf
 “ of the said Edmond Conway to the discharge of the said Jurors, of
 “ their the said Justices’ own authority, and in the exercise of the dis-
 “ cretionary power and authority by law in them the said Justices vested
 “ in that behalf, and without the consent of the said Edmond Conway
 “ in that behalf, and without the consent of our said Lady the Queen,
 “ or of the said Stephen Seed, or of any other person on behalf of our
 “ said Lady the Queen in that behalf, they the said Justices then and
 “ there, in said open Court, released and discharged the said Jurors
 “ from finding any verdict on said indictment, and then and there
 “ ordered the said Jurors should be allowed forthwith to separate and
 “ go at large, as they the said Justices lawfully might, for the cause
 “ aforesaid; and thereupon the said Jurors in said plea named, then
 “ and there separated and went at large without finding any verdict
 “ upon the said indictment or the matters therein contained, or any of
 “ them.”—Verification.

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The second plea differed from the first, only in stating the proceedings at the second Assizes and the adjournment thereof, before Richards, B., and Jackson, J.; the replication thereto added, that all the other business of the adjourned Assizes and the Commission of Oyer and Terminer had finished and was concluded, and that the Sabbath-day was drawing near.

The record then set forth a demurrer to the replication by Edmond Conway, and joinder therein by the Crown, and that judgment was given for the Crown by the presiding Judges. That similar pleas were filed by Patrick Lynch, and that the same proceedings were the result; that the prisoners were found guilty and sentence of death pronounced upon them.

The prisoners having been brought before the Court by a writ of *habeas corpus*, handed in separate writs of error; the error alleged being that judgment upon the demurrers should have been given for them, and that a judgment of acquittal should have followed.

Mr. Copinger, with whom was Mr. John Waller and Sir Colman O’Loghlen, for the prisoners.

The first plea is the important one on which this question is to be decided, for if the replication to that plea be good, the second plea cannot be sustained; that question is, whether the Judge of Assize is justified upon the grounds alleged on the replication to discharge the Jury, that is, whether at his discretion he can do so, no fatality occurring

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either to the Judges, Jury, or prisoners? We say it is contrary to the law of the land to discharge a Jury charged in a capital case with prisoners, on the supposition that a reasonable time had elapsed for their finding a verdict. The replication shows no legal ground for discharging the Jury; it does not appear from it whether the Assizes had terminated with the trial of these prisoners, nor that there was no other business to be disposed of, nor that the Jury were discharged at the bounds of the county, nor that they were carried from county to county during the continuance of the Commission, nor that they were discharged at the request of the prisoners, nor for the benefit of the Jury themselves; nor does it appear that they were discharged by any misconduct of the prisoners, or any fatality happening, or any sudden interruption to the due course of justice, or any violation of their duty as Jurors, or any disqualification of them by attainder or otherwise from serving. The only grounds stated are, that a sufficient time to enable the Jury to agree upon their verdict had elapsed; that the Judges, of their own authority, and in the exercise of the discretionary power vested in them, had discharged the Jury.

In 1 *Inst.* 227, *b*, it is said "a Jury sworn and charged in a case of life or member cannot be discharged by the Court, or any other, but they ought to give a verdict." Again, in 3 *Inst.* 110, "To speak it here, once for all, if a person be indicted for treason, or of felony, or larceny, and plead not guilty, and thereupon a Jury is returned and sworn, their verdict must be received, and they cannot be discharged." In 22 *Vin. Abr.* 338, *Plea* 3, *Trial X. E.*, 4, it is said "in capital cases a Juror cannot be withdrawn although all the parties consent to it." In *Bro. Abr. Enquest* 30, the same dictum is laid down, and in 2 *Hawk. Pl. Cr. B.* 2, c. 47, *Verdict*; *Hale's Summary of the Law, Verdict*, 267; in 2 *Hale's P. C.*, 295, there is some departure from the principle laid down in that passage from the *Summary*; but no Judge would now act on the principle there enunciated—[CRAMPTON, J. I think *Hale* only alludes to it as the then practice, without stating it to be his opinion].—*Whitbread's case* (*a*) may be relied on by the Crown, but the reasons given by the Judges in that case show that they considered it a case of necessity. There are cases, doubtless, where a Judge is bound to discharge a Jury, as in cases of evident necessity; but if a Judge is to have absolute discretion, where is it to begin, where to end? A case in *Kelynge*, 26, may be also cited; *Kelynge* was a Judge at the time of *Whitbread's case*, and must be taken to have assented to the doctrine there asserted. In pp. 47, 52 of *Kelynge*, the doctrine is further followed up. *Ferrar's case* (*b*) may be also relied on, but that case was decided by

(a) 7 St. Tr. 311.

(b) Sir T. Ray. 84.

Twisden, Kelynge and the other Judges who ruled *Whitbread's case*, and we know that they were Judges dependant on the Crown; these cases were prior to the Revolution. *Chadwick v. Hughes* (a) contains a note by Holt, C. J., that it was the opinion of all the Judges, that in capital cases a Juror cannot be withdrawn though all the parties consent thereto; secondly, that in criminal cases, not capital, a Juror may be withdrawn if both parties consent, but not otherwise; and thirdly, that in all civil cases a Juror cannot be withdrawn, but by consent of all parties. These rules are recognised in 10 *Vin. Abr. C.* 4; 1 *Salk.* 201, and 7 *Mod.* 1. In the present case the prisoners made no objection to the Jury being discharged, but that is immaterial, because a prisoner's consent ought not to be asked in a criminal case: *Rex v. Jeffs* (b); and if a party cannot consent, how can it be argued that a Judge may discharge a Jury of his own motion, that Jury trying the prisoner for his life? That case of the *King v. Jeffs* overrules the cases decided in the reign of *Charles the Second*. In *Lord Delamere's case* (c), Herbert, C. J., recognises the doctrine in 1st. *Inst.*; *Rookwood's case* (d); *Rex v. Segar* (e); *Rex v. Morgan* (f).

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The opinion of text-writers on this subject may be referred to as acquiescing in this doctrine; *Dickenson's Quarter Sessions*, by *Talfourd*, 533, citing *Rex v. Stokes* (g); 4 *Bac. Abr. Juries*, G. 576, note, and p. 578; *Trials per pais*, 252, 629; 1 *Deacon Cr. L.* 705, *Preface to the 1st St. Tr.* 19; 4 *Black. Com.* 360; *Rex v. Edwards* (h); *Bolton's Justice of the Peace*, 331; *Bollingbrook, J. P.*, 473. On the trial of *Cobbett*, reported in 3 *Burn's Justice*, 974, Lord Tenterden discharged the Jury, but that was a misdemeanour case.

It is not unimportant to refer to the statute 55 *G.* 3, c. 42, which introduced the Jury trial in civil cases into Scotland. The 34th section of that Act enacts that if the Jury do not agree in their verdict within twelve hours from the time they shall have been enclosed to consider it, they may be discharged by the Court. If a Judge could discharge a Jury in a capital case, what would be the necessity of an enactment empowering the Judge in a civil case to discharge them after the lapse of a certain time? (30, 31, *Hansard's Parliamentary Debates*); and is it not deducible from that statute that the law was well established, that a Judge has no such discretion as is contended for by the Crown?

The history of the introduction of trial by Jury is stated in 1 *Reeves'*

(a) *Carth.* 465; *S. C.* Holt, 403.

(c) 11 *St. Tr.* 510.

(e) *Comberb.* 402.

(g) 6 *Car. & P.* 151.

(b) 2 *Stra.* 984.

(d) 13 *St. Tr.* 139.

(f) *Foster* 24.

(h) 4 *Taunt.* 311; *S. C.* 3 *Camp.*

H. T. 1845. *History*, 85; *Glanvill*, B. 2, c. 15; *Bract. B.* 4, c. 19; *Fortescue de Laud.* 118; *Fleta*, 116, 117, 118. From the time of *Henry the Second* to *Edward the Third* the practice was, that when once a Jury was charged, they should not be discharged until they gave a verdict; *Wingate's Maxims*, 495; *Tomlin's Law Dict.*, *Jurors* 3.

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There are some modern cases in which this question has been decided. In *Regina v. Leary and Cooke* (a), Ball, J., states, that the Judges had agreed that it was not in their power to discharge a Jury merely because they had remained a considerable time shut up without any prospect of agreeing; and in *Regina v. Lecken* (b), Doherty, C. J., states that the Jury should be kept until the end of the Assizes: *Regina v. Wardle* (c). These were cases in which, if a discretion of discharging a Jury existed, the Judge would have been fully justified in exercising it; but they show that he has no such discretion except in cases of evident necessity; and the cause of this necessity ought to be stated upon the record, in order, if necessary, that it might be reviewed by a superior tribunal. In *Kinlock's case* (d) the judgment of Foster, J., is given, and he was one of the Judges of the time of *Car.* 2; he says it may be done in favour of the prisoner; but it cannot be said that the discharge of the Jury here was in favour of the prisoner, or at all advantageous to him.

There are other circumstances known to the law which lead to the conclusion that the Judges had not this discretion; there is the carting of Juries from county to county: *King v. Ledgingham* (e); *Morris v. Davis* (f); 1 *Chitty Cr. Law*, 634; and the same practice was followed in this country by Bushe, C. J., within the last ten years; for at the Trim Assizes some few years ago, a Jury were carried twenty miles by him and discharged at the bounds of the county; and Judge Torrens carried a Jury from Omagh twenty-three miles. If the discretionary power existed, why should the Judges, for a mere formality, have put the county to such an expense?

That the Judge had the power of discharging Juries in cases of evident necessity is well established: *Rex v. Edwards*; *Rex v. Barrett and others* (g); *Rex v. Delany* (h); *Rex v. Scalbert* (i); *Hayes' Cr. Law*, 614, 618; *Rex v. Stokes*. A case occurred in Limerick—*Rex v. Murnane*—before Mr. Serjeant Greene, and he kept the Jury thirty-six hours, stating, that were it not for evidence given that a Juror, if longer con-

(a) 3 Cr. & Dix, C. C. 213.

(b) *Ibid*, 174.

(c) *Car.* & M. 647.

(d) *Foster's Cr. Law*, 16.

(e) 1 *Ventr.* 97.

(f) 3 *Car.* & P. 429.

(g) *Jebb's Cr. & Pres. Cases*, 103.

(h) *Jebb's Cr. & Pres. Cases*, 106.

(i) 2 *Leach*, C. C. 620.

fined, would be in danger of his life, he would not discharge them. We therefore submit that the demurrer ought to have been allowed; that there exists no law giving the discretionary power contended for to the Judge; that there was no necessity for the discharge of the Jury in this case, and that therefore the prisoners should be discharged.

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The *Solicitor-General*, Mr. *Bennett*, Q. C., and Mr. *Keller*, Q. C., for the Crown.

We make no objection to want of form or technicality in the pleas, but wishing the question to be settled, as to a Judge exercising his discretion in allowing a Jury to separate, we have thought it right that the facts should be set forth on the record. The rule as laid down in *Co. Lit.* cannot be taken in its literal sense; for in 3 *Inst.* he says, that the Jury must not be discharged, but the verdict must be heard, that is, if the Jury will give a verdict it must be received, and the Judge shall not have the power to prevent their giving it. It is not controverted that the Judge has a discretion as to discharging Juries in some cases, such as illness, &c., thus showing that the old rule cannot be received in its full sense, because the fact of a discharge in any case shows that there existed a discretion. It has been the practice of Judges to use means to inform themselves as to sufficient grounds existing for the exercise of that discretion, but there is no rule of law to oblige a Judge to do so. If the Judge examine a medical man, it is a voluntary act of his, but there is nothing compulsory on him to do so; and in such case, if the doctor gave false testimony, there would be no means of punishing him.

PERRIN, J.—I should apprehend, that if a man were brought forward to give testimony to satisfy the Court, and if he deposed to what was false, he would be liable to be prosecuted for perjury. It is not necessary that his depositions should be as to the matters in issue, but if given in the course of a judicial proceeding, he would be as liable to punishment as if he had sworn it in the course of the trial.

Mr. *Keller*.—Suppose the Assizes were to last for a month, are the Jury to be imprisoned for that month, because some of them will not find a verdict contrary to their conscience? Again, if the Jury do not agree before the departure of the Judges into another county, the Sheriff must send them along with him in carts, and the Judge may take their verdict in another county: *Bac. Abr. Jury, G.*,—*Rex v. Ledgingham*; but it is no matter of necessity that the Judge should leave the town at the end of the Assizes; and that argument not being founded upon matter of necessity, can only be sustained on the ground that the Judge has a discretion in him as to when he shall discharge the Jury.

The cases cited apply to three periods: first, where the discharge of the

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Jury occurred before any evidence was given ; second, after evidence had been given ; and thirdly, where the entire evidence had been concluded : 2 *Hale*, 295, 297. In *Lord Delamere's case*, the Jury were not allowed to separate, in order to prevent their being tampered with, but there is nothing to show that the Jury would give no verdict : *Foster's Cr. Law*, pp. 23 and 34. "No general rule can govern the discretion of the Court on this question in all possible cases and circumstances." Foster, J., treats the position in *Hale's Summary*, as of no authority, and says that the case in *Carthew* was a mere dictum. Modern practice is quite opposed to the system of carting Juries : 2 *Hayes' Cr. Law*, 450. In *Rex v. Scalbert* there was no necessity for the discharge of the Jury, because by deferring the trial for a short time, the Juror might have been able to discharge his duty, thus showing that the Judge had a discretion ; and *Meadows' case*, in *Foster*, 76, is to the same effect ; and with respect to *Ferrar's case*, Foster says, "It seems that an opinion did once prevail that a Jury "once sworn and charged in any criminal case whatsoever, could not be "discharged without giving a verdict ; but this opinion is exploded in "*Ferrar's case*, and it is there called a common tradition, which had "been holden by many learned in the law." That case cited from *Cr. & Dix*, 535, was not a case of necessity, because there was a possibility that the Juror might be able to return to his duty after the lapse of a reasonable time.

The law upon this subject has been considerably relaxed. Formerly it was supposed there would be no adjournment of a trial ; that doctrine was exploded in *Hardy's case* (a) ; *Stone's case* (b) ; *Rex v. Wolfe* (c) ; and afterwards in *The King v. Edwards* ; and it was considered unnecessary to require consent, and the Judges adjourned the Court upon their own authority. Lord Ellenborough in that case says, "The Court "takes notice that the strength of man is not sufficient to go through "such continued labour without meat and sleep, and that is one of the "cases of necessity." The Jury Act in Scotland enacts, that if the Jury do not agree within twelve hours, they are to be discharged ; that is a Legislative declaration, that twelve hours are sufficient to enable a Jury to come to a conclusion. In *The King v. Barrett* (d), the Jury were discharged without the consent of the prisoner, and the Twelve Judges decided they were properly discharged ; and in *The King v. Kinnear and others* (e), the question was similar to that in *Hardy's case*, as to the adjournment of the trial ; and the Court there held that the Judges had a discretion to allow the Jurors to separate. *The King v. Shields* (f)

(a) 24 St. Tr. 414.

(b) 6 T. R. 530.

(c) 1 Chit. R. 401.

(d) Jebb, C. C. 103.

(e) 2 B. & Al. 462.

(f) 28 St. Tr. 618.

shows that this was the prevailing practice. In 3 *Burns' Justice*, 974, a passage is cited from *Doct. and Stu.*, which shows how long the opinion as to discretion prevailed; and the same doctrine is laid down in 3 *Williams' Justice*, 97; *Dick. Quar. Sess.* 583; 1 *Chitty Cr. Law*, 634; and 2 *Gabbett Cr. Law*.

The doctrine enunciated in some of the old cases, that if it should appear upon the trial after the prisoner has been given in charge, either that the evidence was defective, or that a favourable disposition towards the prisoner appeared, a power exists in such case in the Judge to discharge the Jury, is justly condemned; but it shows that some discretion did exist.

If the old rule of common law were carried out in all its strictness with respect to carting Juries, the Judge is bound to carry them all round the Circuit, and to keep them together without meat, drink or fire until they are agreed; and that being found to work injustice, it was necessary to relax the rule, and accordingly the position laid down by *Blackstone* was adopted. *Doctor & Student*, 271, shows that a discretion may be exercised; and this is adopted by Foster, J., in *Kinloch's case*, 31.

None of the authorities require that the Judge should state his reasons for the discharge of the Jury; the omission to state the facts upon which the Judge founded his conclusion on which he discharged the Jury, does not amount to error: it would be unnecessary, for a Court of Error has no right to inquire into this discretionary power in the Judge.

PERRIN, J.—Suppose that to be the case, can you sustain this record, as there is no opinion of the Judge recorded? for we only find an entry of the case having remained untried and undisposed of, and it does not say that the Judge pronounced any opinion or made any rule. In *Shields' case* the Judges recorded their opinions.

Mr. Bennett.—It must be taken as admitted upon the record, that more than a reasonable time had elapsed to enable the Jury to agree in their verdict, as no issue has been taken upon that statement.

PERRIN, J.—The difficulty I feel is this; we have not the opinion of the Judge below recorded; nor have we an opportunity of forming an opinion, upon any thing before us, upon what grounds he acted. I am inclined to agree with you, that upon every matter of fact, the expression of the Judge's opinion is conclusive, as when he records that he discharged the Jury from illness; but we ought to see that recorded.

Cur. ad. vult.

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PERRIN, J., after stating the record, proceeded to say—

The question upon this record (the material parts of which I have stated) is not whether in any state of things a Jury, charged with the trial of one indicted, may be discharged without a verdict; but, whether a Jury, charged with the trial of one indicted for murder, may be released and discharged from finding any verdict, not by reason of any fatality or misconduct of the Jurors, or by any accident or infirmity in a Juror or a Judge, nor at the request of the prisoner; but, whether, after the lapse of more than what the presiding Judge considers a sufficient and reasonable time to enable the Jury to consider and fully deliberate upon their verdict, and agree to it, and when they, in open Court, declare before the Judge, that they had not agreed, and that they would not agree together upon a verdict, nor find or say whether the prisoner was guilty or not; whether upon that lapse of time, sufficient in the estimation of the Judge, he may, of his own authority, and in the exercise of a discretionary power in him vested, and without the consent either of the prisoner or of the prosecutor, discharge the Jury from giving a verdict? This is the whole cause as spread upon this replication, which is the statement upon the record by the Clerk of the Crown and Attorney for the Queen, and which, in strictness, he ought to have entered when the Jury were discharged; which, if he had done, there would have been no need of a plea on the part of the prisoner, as that which is set out on the replication would have shortly been entered in the form of a continuance. It was the duty of the Clerk of the Crown to have made an entry of the rule made by the Judge, and the reason for that rule. It hardly requires that an authority should be stated for that, because continuances must be entered, whether in civil or criminal cases, to show that a legal course has been pursued from the commencement to the end of the proceedings: it is hardly necessary therefore to refer to an authority; but in the case of the *King v. Edwards (a)*, we find, in the note to that case, it is stated, the correct way in such cases seems to be to discharge the Jury, and order the Clerk of the Assize to make an entry of their being so discharged, with the reason of it, and then to call over the Jury again and give the prisoner his challenges again.

In this case the real question has been argued on both sides, and none of form was raised either on the part of the prisoner or of the Crown; and therefore it must, in the consideration of the question, be taken as if the Judge had directed the rule to be entered, stating his opinion that a reasonable time had elapsed. From the manner in which it has been averred, it might be said to be the mere assertion of the Clerk of the Crown, but I think the case has been put upon the real

(a) *Rus. & Ry.* 225, n.

and the substantial question, and it must now be taken as the act of the Judge, although the Clerk of the Crown has omitted to add *prouit patet per recordum*.

I shall therefore proceed to consider the only question on this record, which is, as I have before stated, not whether upon the facts as disclosed that order could or could not be legally made; neither is the question whether this matter might or might not be pleaded in bar of another indictment for the same offence; but the only question is, whether, after the lapse of more than what the Judge deems a reasonable time for a Jury to deliberate and agree upon a verdict, he may lawfully release and discharge them without finding a verdict, and the prisoners be put upon a fresh trial upon the same indictment. That the rule upon this very important question has been varied from time to time, either qualified, corrected, or differently understood, is unquestionable. *Kinloch's case* (where that general rule, as expressed by *Coke* and *Hale*, seems to have been adopted, but not to have been admitted to be universally binding) is in my mind a very weighty authority. The Judges there agreed, that admitting the rule laid down by Lord Coke to be a good general rule, yet it could not be universally binding, nor is it easy to lay down any rule that will be so. I entirely agree with that opinion; and if applied to this particular case, it does appear to me, that this opinion is well founded, and that the rule ought to be varied only in cases of evident necessity; and it therefore must depend upon the facts of the case, whether there be a necessity or not. The rule cannot bind where it would be productive of great hardship or manifest injustice to the prisoner. The opinion so expressed has in fact been followed, viz., for the sound, and as I deem it, established rule for near a century "that a Jury sworn and charged in a capital case cannot be discharged until they have given a verdict, unless in a case of necessity."

I do not think it necessary to refer to any of the cases before *Kinloch's case*, or to consider any of the older authorities; they do not appear to me to throw any light upon the question; nor do I think it necessary to make any observation upon the opinion of Lord Hale; both have been properly put out of the case by the *Solicitor-General* in his argument, and I think I may take up the consideration of the question with *Kinloch's case*.

The qualification of the rule by *Blackstone*, which appears a legitimate adoption of the opinion of the Judges in *Kinloch's case*, has been since followed in the case of *The King v. Edwards*; *The King v. Delany*; and *The King v. Barrett*. It appears to me that *Shields' case* was put upon a supposed, if not a real necessity. In an authority which I have referred to as having been decided at Spring Assizes of 1829 for Carrickfergus, and of which I myself took a note at the time, William Kells was

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indicted for a rape, he pleaded not guilty; he was arraigned, the Jury sworn and he given in charge. The prosecutrix was called and came forward on the table and was about to be sworn, but she appeared so much agitated and in so infirm a state that Mr. Scriven, for the prisoner, suggested to the Court the difficulty of examining and cross-examining her in that state, on which, the Judge had her inspected by a medical man sworn then in Court, who, on feeling her pulse, &c., on oath deposed that he did not think she could, with safety to her life, be examined in her then nervous and agitated state, whereupon the trial was, with the consent of the prisoner's Counsel postponed, and the Jury discharged; of this Daly, J., of his own accord took a note. At the following Summer Assizes, Kells, who had been bailed, was again arraigned and pleaded not guilty, and when he was about to be given in charge to the Jury, Fox, J., stated that Daly, J., had laid the circumstances of this case before the Judges in Dublin, who were of opinion, that the prisoner could not be again tried for the same offence; that the consent of his Counsel made no difference; that they had considered all the cases; that a discretionary power had been before the Revolution exercised by Judges, of interrupting and then postponing trials; that they considered such conduct highly dangerous, and likely to be oppressive; that they could not say there was no case in which a trial might not be interrupted, for they were of opinion, that when it was for the prisoner's benefit necessarily interrupted and postponed, as, when during the trial he was seized with a sudden phrensy, he might be again put on his trial; yet, here the prisoner could not be again put on his trial, and though he had pleaded not guilty in this instance to save him trouble and expense, he allowed him to take advantage of the matter at this stage, and he was accordingly discharged. I think that an authority of great weight; the objection was not taken by the Counsel for the prisoner at the time, but Judge Daly, who tried the case, reported it to the Judges who considered it; and Judge Fox, when the case came on again for trial interrupted the proceedings, and stated the opinion of the Judges; and that the prisoner ought not again to be put upon his trial.

The soundness of the exception in the case of necessity is sustained by a number of authorities. In my apprehension, necessity will justify a departure from the strict rule; but it will only justify that departure as far as the necessity goes. The maxim *quod necessitas cogit, defendit*, was adopted in *Hardy's case*, *Tooke's case* and in *Stone's case*. It is a principle of the common law and of common sense, that what becomes absolutely necessary in the course of legal proceedings, must be done; but the rule is not to be expanded beyond that legal principle upon which it is founded, so far as to say a Jury may be discharged when the Judge thinks it right, in the exercise of his discretion; or which is the

same thing, that the fact creating the necessity, and the rule of the Court thereon, is not to be recorded in order to attest that necessity. In all the cases I have referred to, the Judges considered the form of the entry, and accordingly directed that an entry should be made of the necessity for the adjournment, and the reason of it, and the rule of the Court; and thereupon the fact of the necessity, according to the rule of the Court, was recorded in order to show that the Jury were not discharged contrary to, but according to law. I assume that every act of the Court ought to be recorded and truly, in order that the proceedings may appear to be according to law, or that they may be reviewed by a Superior Court; accordingly, in case any new proceeding be adopted, of course (especially in capital cases), that ought to be recorded with the ground upon which the Court took that proceeding, as was in *Tooke's*, *Stone's* and other cases. If, for instance, in the case of illness either of a Judge or of a Juror, or from the necessity for the Judge to quit the county, as in *Shields' case*, or of any other necessity, it ought to be recorded; or if, as has been argued, in the case of exhaustion or incapacity in a Juror, it appeared to the Judge that he was incapable of doing his duty, and that the Judge thought that a sufficient reason, that ought to be stated; though I cannot agree with the argument that the Judge could discover what others could not, or that he could see grounds for, discharging the Jury, which could not be stated. If the record merely states that a reasonable time had elapsed, and nothing more, I do not see how that forms a case of necessity for the discharge of the Jury. If so long a time had elapsed that they require refreshment, and could not continue to deliberate without it, then accordingly that might be a reason why they should have refreshment; but does that render it necessary they should be discharged? It may be said that it is equally invalid, the giving refreshment with the discharge, and that if you may do the one you may also do the other. Now, I cannot believe it equally invalid to give refreshment, because taking the old cases to be law, that Judges brought Juries round to the end of the Circuit, it is impossible to suppose they did not get refreshment; therefore, it is to be inferred, if that rule had been adopted they must have had refreshment to enable them, not merely to give a verdict, but some of the cases say, to continue enclosed.

Now, the record here states that the Court below discharged the Jury upon the bare ground that they had time, and more than time enough, to enable them to agree. It has been very properly observed that the Judge below could see more of the circumstances than we could, and he must have seen that the men were in such a condition, as that it was a question between their losing their lives and giving a verdict; I am satisfied that the Court below never acted upon the bare ground suggested

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on this record—viz., that the Jury had time enough, and more than time enough, to agree on a verdict; but it is enough to say that nothing more has been put upon the record; and we cannot go out of it in a question of this kind, and assume it to be a case of necessity. There is a further difficulty—namely, how can any person fix a time necessary for twelve men to canvass the matter of a trial of twelve hours' duration, when seventeen witnesses were examined, and the arguments of Counsel, the points raised, and the reasoning upon them were to be considered?

I think that there is very considerable difficulty in any person recording as a matter of fact his judgment, that more than a reasonable time for a Jury to come to a sound conclusion had elapsed. Inconveniences have been suggested; and no doubt they may give foundation for a great many objections made; but the inconveniences are both ways, for if a fixed rule is laid down, that as soon as a Jury declare they cannot agree, or if a certain number of hours be fixed, there would be a number of instances in which the case of no verdicts being given would be considerably increased.

The whole of the reasons on this record for the discharge is, that the Jury did not agree within the time the Judge considered enough for them to consider and find their verdict, and that that was a necessity for their discharge, which I cannot admit, there being nothing to show that the Jury were not in health, and in full possession of their faculties.

I do not acknowledge the existence of any discretionary power in a Judge to act upon his own opinion, without grounds shown, which may be considered by a superior Court. I know of no authority for such a position; none such is alluded to in the argument of Counsel, or in the very deliberate judgments and reasoning of the Judges Foster and Wright, in *Kinloch's case*; nor do I find the existence of a power and authority of such extent in any of the books. I recollect even in civil cases, when Juries remained in a considerable time, it was considered a Juror could not be withdrawn without consent. We are all familiar with the proceeding adopted in the case of the eleven Jurors. When the Jury did not agree, they were called over, and one not answering when he was called, the Jury were then discharged, a sufficient number not appearing, it being a fiction of law that but eleven were present. It was a ridiculous fiction, but it showed that it was the opinion of all at that day, that the Judge could not of his own authority discharge a Jury under such circumstances, when no case of necessity was shown; and in the absence of authority civil or criminal, I am slow to be of opinion, that the Judge of his own discretionary power may do it. "Judges must determine, not by the crooked cord of discretion, but by the 'golden meet-wand of the law' (a). In *Hindson v. Kersay* (b), a strong

(a) 23 St. Tr. 991.

(b) 8 St. Tr. 56.

expression is made use of by Lord Camden, which cannot too often be called to our recollection: "The discretion of a Judge is the law of tyrants—it is always unknown—it is different in different men—it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice—in the worst, it is every vice, folly and passion, to which human nature is liable." I admit, that corruption is not to be imputed or supposed in any Judge, but fallibility must be admitted, *humanum est errare*; neither would I subject the opinion of Judges on the determination of any matter of fact recorded as the foundation of this rule to be canvassed before, or submitted to the consideration of Juries; what the record states is not to be averred against, nor is the propriety of a Judge's conduct to be submitted to the consideration of Juries; but whether the rule be right it ought to be considered, if necessary, by a superior Court; and it is no degradation to a Judge to have his rule submitted to the consideration of of a superior or other Court. In all cases the Judge ought to consider his acts reviewable, and errors in his judgment, if any, amendable; and therefore, as I acknowledge the authority, and the legal fitness and propriety of the rule expressed in *Blackstone*, namely, that a Jury cannot be discharged except in the case of necessity, and as upon this record, it is not set forth by the attorney and prosecutor for the Crown, and as it does not appear, that the Jury so charged with the prisoners, and who were discharged, were so discharged from an evident necessity, I think there cannot be judgment upon this record against the prisoners, and that this judgment ought to be reversed.

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CRAMPTON, J.

This case comes before the Court upon a writ of error from the Assize Court of the County of Limerick, and involves a question of vast importance to the administration of criminal justice—[The learned Judge, after stating the record, proceeded thus:—]

The whole record thus made up is now before us upon a writ of error brought by the prisoners; and the error alleged is, that judgment upon the demurrers should have been given, not for the Crown, but for the prisoners, *and that a judgment of acquittal should have been given for the prisoners.*

There is certainly something extremely novel in these proceedings as had in the Court below, and in the shape of this record, and which (if this case be carried further) will not, I am persuaded, pass without observation. After pleading not guilty to the indictment, and putting themselves for trial upon a Jury, the prisoners are allowed not only to plead in bar of further proceedings, but to plead *double matter*.* The

* 1 Chit. Cr. Law, 464.

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Crown, however, seems not to offer any objection to this course, and instead of demurring to these pleas (which in my mind are clearly bad), replied specially to each of them. This was done for the purpose of enabling the prisoners to bring upon the record all the facts upon which they rely, as making for them a defence against any trial of the charge contained in the indictment; and it seems to grow out of the defective manner in which the entries of the proceedings at the two Assizes of the year 1843 were made. The record omits to mention any of the circumstances which led to the original issues being left untried at either of those Assizes, and treats the case as if it were a case of ordinary *remanet*, thus depriving the prisoners of whatever legal benefit those circumstances might entitle them to. To supply this defect, the pleas in question (which are said to be of the nature of plea *puis darrien continuance*) appear to have been resorted to, and the replication thereto filed on behalf of the Crown; and it appears now to be the desire of the Crown that the Court should pronounce its judgment upon this record, as if the facts stated in the plea and replication had been inserted in their proper place by the Clerk of the Crown, as was done in *Kinloch's case*, and in *Shields' case*. However, therefore, unusual or irregular this course may be, I shall proceed to give my humble opinion upon the main question which has been raised upon this record, and argued at this bar. The question is, should the Judge below have allowed the demurrers in this case, and pronounced thereupon a judgment of acquittal for the prisoners?

It is admitted by the Crown that if judgment upon the demurrers should have been given for the prisoners, that the prisoners were entitled to a judgment of acquittal, just as if the pleas in question had been pleaded to a new indictment and held to be good pleas; it would have been useless and absurd to have awarded a *venire de novo*, since the ruling of the demurrer for the prisoners against the Crown would have decided that the prisoners should never be tried at all; and accordingly, the case has been argued before us just as if there had been a new indictment found against the prisoners, and the special pleadings upon which the questions before us arise had been pleaded upon that new indictment.

The question mainly argued before us is this; do the facts stated in the first plea, and the replication thereto, amount to a discharge of the prisoners from the charge contained in the indictment? A similar question arises upon the facts stated in the second plea, and the replication to it; to determine those questions, it becomes now necessary to state the facts contained in the special pleas, and to the replications thereto. The facts stated in the first plea, and the replication to it, are these:—That at the Spring Assizes of the year 1843 for the county of Limerick, the prisoners having severally pleaded not guilty to the

indictment, were duly given in charge to a Jury then and there duly empanelled and sworn; that witnesses were examined both on the part of the Crown and of the prisoners; that the case having closed in evidence, and the Jury having heard the summing up of the presiding Judge, they retired to their private room to deliberate on their verdict; that they remained in their private room for a long time—to wit, twenty-four hours, *without meat, drink, fire or other refreshment*; that on the next day they came from their private room, and in open Court declared to the presiding Judge “that they had not agreed upon any verdict, and that they could not agree upon any verdict respecting the prisoners;” and that thereupon the Jury were, in the exercise of his judicial discretion, discharged by the presiding Judge without consent and without objection, and without any fatality having occurred. The facts disclosed upon the second plea, and the replication to it, are substantially the same; with, however, the additional circumstance that the discharge of the Jury at those second Assizes *did not take place until after all the other business of the Assizes had been concluded, and upon the eve of an approaching Sabbath.*

The case thus appearing, has led to a discussion of the delicate and difficult question, whether the discharge of a disagreeing Jury by the Judge presiding at a criminal trial, be an act of discretion on the part of the Judge; or, be the exercise of a power given to him only in certain special cases? The prisoners’ Counsel lay it down broadly that no such discretionary power is vested in the Judge, and that the discharge of the Jury by the presiding Judge, both at the first and at the second Assizes, but especially the first, was an illegal act, and appearing on the record, amounts to error. The Crown, on the other hand, insists that by law there is vested in the Court a discretionary power (under the circumstances appearing on this record), to discharge the Jury, and to remand the prisoners for trial at the ensuing Assizes. Upon this statement it is impossible not to see, that if the discharge of the Jury under the circumstances stated upon this record, either at the first or the second Assizes of the year 1843, now entitles the prisoners to a judgment of acquittal (as is claimed for them by this writ of error), that their defence upon this occasion, though not formally, is substantially the well known defence of *autre fois acquit*, though the averment of the record is, that the prisoners were not tried either at the first or the second Assizes; and that averment, in legal construction, cannot be controverted.

Upon this subject, I shall hereafter make some observations; but first, I would remark that the question raised upon the second plea, and the replication to it, was scarcely discussed at the Bar, partly because the main question for decision arises more formally for the prisoners upon the first plea, and partly because the case of *Rex v. Shields* (a) was felt to be upon the

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(a) 28 St. Tr. 619.

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point ; and that if that case be an authority, it rules the demurrer to the Crowns' replications to the prisoners' second plea, against the prisoners. That was a case of murder, and was first tried at the Commission Court in Dublin, before Baron George and Judge Finucane. Shields and two other prisoners were on trial ; the Jury retired upon the close of the case at three o'clock in the evening ; they remained in deliberation all night, and on the next day at ten o'clock they acquitted the two other prisoners, but not agreeing as to Shields, they were discharged ; all the other business of the Commission had been then concluded ; the Court thereupon adjourned the Commission to the 6th of December then next (1802), and remanded the prisoner for trial at the next Sitting upon that day. On the adjourned day, before Judges Day and Fox, the trial of the prisoner Shields was proceeded on ; but before the case was entered into, Mr. Gifford, one of the prisoner's Counsel, moved to have read the rule discharging the Jury at the former Commission, "in order that he might be enabled to understand under what circumstances the Jury had been discharged, in case any point should arise as to the legality of his client being put a second time upon his trial." The rule was accordingly read ; and it imported "that inasmuch as the Jury could not in anywise agree, and that the Justices were about to depart from the county, the business having been finished, the said Jury were ordered to be discharged, and the prisoner Shields was thereby remanded, that he might abide his trial at the next Sitting of the Commission." This rule being read no plea was offered, and no objection was raised to the trial proceeding. Along with Mr. Gifford were Mr. Egan, Mr. Bushe and Mr. Driscoll, as Counsel for the prisoners, and though absent at the time the rule was read, they appear afterwards to have come into Court and taken their part in the trial ; and by none of those eminent Counsel was any objection raised. Shields upon this trial was acquitted ; but it is quite manifest that the four Judges presiding on those two occasions, the Counsel for the Crown, and the prisoners' Counsel, including our late venerable and distinguished Chief Justice, then at the Bar, were all of opinion that the discharge of the Jury in *Shields' case* was legal. The question arising upon the prisoners' second plea in this case, is identical with that raised and relinquished by the prisoner's Counsel in *Shields' case* ; and the circumstances of the discharge in *Shields' case* differ from those appearing upon the prisoners' first plea, and the replications to it, in *this one circumstance only*, that in *Shields' case*, at the time of the discharge of the Jury, all the other business of the Commission was concluded ; here the business of the Assizes had not terminated ; how far that circumstance should avail upon the argument remains to be considered.

It appears to me then, that our inquiry may be limited to the questions

arising upon the prisoners' first plea; the demurrer admits the facts stated in the replication, and the question then is whether the discharge of the Jury by the Judge, under the circumstances stated in the first plea, and the replication thereto, amounted also to a legal discharge of the prisoners; and here I think we should carefully distinguish between the existence of such a discretionary power in the Court as is contended for on the part of the Crown, and the exercise of that power by the Judge; the Judge may not have any such power entrusted to him by the law, or he may have the power vested in him and may exercise it indiscreetly. Our inquiry is not now whether it would have been *more expedient* or *more prudent* for the learned Judge who presided at the Limerick Assizes of Spring 1843, to have given further time for deliberation to the Jury, or to have kept them in ward until the end of the Assizes, or until they or some of them became dangerously ill. But our inquiry is, whether the Judge had any discretion at all upon the subject; whether he did not upon that occasion assume a power not given to him by the law of the land; and whether the prisoners having thus (as it is argued) had their lives once in jeopardy, were not by the discharge of the Jury under the circumstances before stated, for ever freed from any further impeachment upon this charge of murder.

Without going back so far as *Fleta* and *Bracton*, it must, I think, be admitted that the old rule of practice (whether that rule was imperative or discretionary) was, "That a Jury once sworn and charged in a criminal case could not be discharged without giving a verdict:" 3 *Inst.* 110; *Ferrar's case* (a); *Foster's Crown Law*, 31. And indeed the same rule was originally applicable to civil cases also: *Morris v. Davis* (b); 2 *Hale*, 297.

Secondly, it was also held, that there could be no adjournment of a trial, and no separation of the Jury: *Rex v. Woolfe* (c), and the learned note there.

Thirdly, it was holden that the Jury, after retiring to consider of their verdict, must remain without meat, drink, fire, candle-light or other refreshment, until their verdict was given in. 2 *Hale*, *P. C.* 297, "The Jury "must be kept together without meat, drink, fire or candle-light, until "their verdict be given in."

Fourthly, if the Jury are not agreed before the departure of the Judge into another county, the Sheriff must send them along in carts, and the Judge may take and receive their verdict in another county: 2 *Hale*, 297, *Rex v. Ledgingham* (d).

The principle of all these severe regulations was, that the non-

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(a) Sir T. Ray. 84.

(c) 1 Chit. R. 401.

(b) 3 Car. & P. 427.

(d) 1 Vent. 97.

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agreement of a Jury within a reasonable time was evidence of refractoriness and perverseness on the part of the Jury, and a contempt for the administration of justice,—and that they should therefore be coerced into agreement by personal suffering and inconvenience, a punishment, as Mr. *Evelyn* says, worse than that of the criminal they were trying. The absurdity of this doctrine is well exposed by Chief Justice Vaughan, in his celebrated judgment in *Bushell's case* (a). But the doctrine is as wicked as it is absurd: there may be (and no doubt often are) cases in which different men will honestly draw different conclusions from the same evidence, and to attempt by punishment to force men to agree to verdicts contrary to their conviction, is the height of injustice, and pregnant with the most mischievous consequences. The principle then of punishing Juries into agreement is exploded; but some of the rules flowing mainly from that principle still continue to operate; these, however, have been greatly modified in modern practice. Thus, the rule disallowing candle-light to a Jury during their deliberations by night, has been long exploded; and the usual bailiff's oath now contains an exception for candle-light. Secondly, the criminal Courts as well as the civil Courts, have for many years exercised the discretionary power of adjourning a trial from day to day, and sometimes even of allowing the Jury to separate and return for the night to their respective homes: *Rex v. Stone* (b). Thirdly, the practice of carting Juries about after the Judge of Assize from county to county, seems to have fallen altogether into disuse. Fourthly, the rule as to discharging Juries, who after a reasonable time cannot agree, has been also greatly relaxed.

Thus, in civil cases, the discretionary power of the Judge to discharge a Jury is universally conceded; *Morris v. Davis* (c); *Cooke v. Caldecott* (d). In this latter case when a question of consent was raised, Lord Tenterden said, "I have authority to discharge." Thus also in misdemeanour cases the rule seems also to have been relaxed; for although in 3 *Inst.* 110, the rule as to discharging Juries is so laid down as to include larcenies (according to the ancient practice), which included all pleas of the Crown as stated in *Ferrar's case* (e), and is so severally stated by *Foster*, p. 31; yet in *Co. Lit.* 227, b, and in *Hawkins*, and in the later books the rule is confined to cases affecting life or member, and sometimes to capital cases. And even in capital cases Juries have on several occasions been discharged after the prisoners being given in charge, and evidence gone into, and even after the case being concluded in evidence and the Jury retired.

(a) Vaug. Rep. 141.

(b) 6 T. R. 527.

(c) 3 Car. & P. 427.

(d) 4 Car. & P. 317.

(e) Sir T. Ray. 84.

Now, I ask, by what authority were all these changes introduced? At one period the Judges of England appear to have countenanced a practice as to discharging Juries, which is the very opposite extreme to that rigid unbending rule contended for by the prisoners' Counsel; for in cases in which the evidence in support of a prosecution appeared to the Court to be defective, and therefore, insufficient to convict the prisoner, the Court has discharged Juries after evidence given, and remanded the prisoner in order to enable the Crown to mend their defective case. This was, indeed, a most oppressive and unconstitutional exercise of power, and as such, it has been reprobated by Sir M. Foster, with whom I could say also, that "I hope it will never be drawn into example." The truth seems to be, that the doctrine which deprives the Court of all discretionary power upon the subject in question, and that which would warrant its exercise to intercept the course of criminal justice, and to discharge Juries at the pleasure of the presiding Judges, are equally removed from the true theory. The rule laid down by *Blackstone* (a)—(a rule, however, unknown to the early periods of the law)—is that by which we are told that modern practice is, and should be governed; it runs in these terms, "When the evidence "is closed on both sides, and indeed where any evidence has been given, "the Jury cannot be discharged (*unless in cases of evident necessity*), "until they have given in their verdict;" and this rule seems to apply equally to all criminal cases. This is undoubtedly a great modification of the old rule laid down by *Coke*; and putting a rational construction upon the term "necessity," it would seem to be as sound and satisfactory a rule as could be laid down upon the subject. Within this rule, the sudden illness of the prisoner, of a Juror, or of the Judge, or the intoxication of a Juror (to which we may here add), or the continuing disagreement of a Jury after all the other business of the Court has been concluded, are all considered to be cases of "evident necessity," and in all of which it is conceded on all hands that the Judge may discharge a Jury. And yet, in none of these cases is there any actual necessity, physical or moral, for the discharge of the Jury. The illness of the prisoner, the illness or intoxication of the Juror, may be but temporary, and a short adjournment of the trial might prevent the discharge at all; in *Shields' case* the Judges might have continued their sittings for another day, or as many days as they chose, for though the trial (which ended on the 5th of November 1802) ended on the day before Term, yet the Judges might have continued their sittings, the Act of the 38 G. 3, c. 38, warranting them so to do, being then in force. The necessity, therefore, seems to be one growing out of a judicial opinion that the duties of the

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Commission for the purposes of justice, and the protection of the prisoner were concluded; that, in fact both those important objects were much more likely to be achieved by a timely discharge of an exhausted Jury, than by prolonging the sittings to await the chances of a verdict, or the illness or death of a Juror. Necessarily vague and indeterminate as the terms of it are, I will assume that this rule of "evident necessity" thus understood, is binding on the Judge; but then arises the important question, is it an inflexible rule of law, the departure from which will make error in the proceedings? or is it a rule which the Courts of law have laid down for themselves? is it a discretionary power to be exercised by the Court for the advancement of justice according to legal principle and precedent? My opinion is, that this discretionary power is vested in the Court, that its existence affords the best security for the prisoner's protection, and for the advancement of justice, and that upon any other principle it will be found impossible to provide for the exigencies that will arise upon criminal trials, and that it alone will account for the continually changing character of the rule itself, and reconcile the various authorities upon this important subject. After considering this question, I shall in the second place examine the position that by the proceedings in this case the prisoners' lives have been more than once in jeopardy. Thirdly, I shall examine the principle of the plea of *autre fois acquit*, and, lastly, consider the consequences of the doctrine contended for by the prisoners' Counsel; and if I am not much mistaken, the result of these inquiries will be, that judgment in this case should be in favour of the Crown.

First, then, I would ask (admitting the stringency of *Blackstone's* rule), who is to determine whether the case of "evident necessity" has arisen? It cannot be denied that (here at least) the Judge has a discretion to exercise; he must decide on the matter of fact that causes the necessity; this he may do upon the oaths of medical men, or other persons, or upon his own inspection and observation; and if he does discharge the Jury, the entry thereupon made in the Crown books is made by the authority of the Judge; it is his entry, and from it there is no appeal. It is the omission to make the proper entries in this case in the Crown books that seems to have produced the plea and replication we are now considering. Two men, two Judges, might differ as to the occurrence of a necessity, and as to the course to be taken with a disagreeing Jury in a particular case; but, still it is the presiding Judge, and he alone, who is to decide (without the interference of a Jury, or any other authority), whether a case of necessity has arisen or not; this he does of course upon his judicial oath, and his personal responsibility: so far, then, it is clear that the Judge has a discretion to exercise; where is the legal limit to this power to be fixed? the prisoners' Counsel

could not fix it; the Judges, in *Kinloch's case*, and *Sir M. Foster*, say it cannot be fixed. I need scarcely add that I cannot fix it. I cannot in principle separate the discretionary power which is to determine whether "a case of discharge" has arisen, from this discretionary power to act upon "that case," and to discharge the Jury. In truth, the terms of exception (viz. "evident necessity"), introduced into the old rule by *Blackstone*, seem to me to show that the learned Commentator held the rule to be one of discretion. He had before him *Kinloch's case*, stating, in effect, that no general rule upon the subject could be laid down; and in stating the practice of the Criminal Court upon this matter, *Blackstone* naturally qualifies the old rule by the general exception of "cases of evident necessity," in order, by general words, to embrace that infinite variety of cases which *Sir M. Foster* says no general rule can cover, and which can be provided for by nothing but the Judge's discretionary power, to be exercised according to the circumstances of each particular case, but always keeping in view the governing principle of *Lord Coke's* rule.

Secondly, the decision in *Kinloch's case* is strong against the existence of the unbending rule contended for by the prisoners' Counsel in this case: the discharge of the Jury in that case was a manifest exercise of discretion by the Court, and *clearly was not the result of any necessity*. That case differs from the present, in the circumstances that the evidence had not been gone into, though the prisoner was given in charge to the Jury, and that the order was made by consent and on motion of the prisoner's Counsel. But the order so made is as irreconcilable with *Coke's* rule as the discharge at the Limerick Assizes was; for the old rule makes no distinction between the cases in which after a prisoner is given in charge, evidence has been gone into, and the cases in which none has been given; and it will be scarcely contended that after the prisoner is given in charge, and before evidence is given, the Judge has a discretion which is taken from him as soon as one witness has, on his oath, merely stated what was his name. And secondly, the orders being made on consent, and at the prisoner's instance (though in itself an important ground for making the order), can make no change in principle. The old rule (and even *Blackstone's* rule) does not except cases of consent, and the result of modern authorities is that the prisoner's consent should never be asked, nor indeed taken, except in cases manifestly for the prisoner's benefit. The order was made in *Kinloch's case* upon motion, and (though ultimately on consent yet), after an ineffectual resistance to the order by the Crown, and was manifestly an act of discretion exercised by the Court without the intervention of any necessity, misconduct, or fatality; it was an order made with great caution and tenderness by the Court, and a departure from the general rule by which the conduct of Judges is, and should

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severally be governed; it was an indulgence to the prisoners to let them into a defence which inadvertently they had pretermitted making at the proper time. It has been urged, that the discharge of the Jury in *Kinlock's case* being for the benefit of the prisoner distinguishes that case; it was so undoubtedly, but can that circumstance (save as an argument to the discretion of the Court) make any difference? There is no such exception to the old rule, and if there were, it would only shift the difficulty a stage, for who is to judge whether the discharge be, or be not for the benefit of the prisoner? It cannot be left to the prisoner to decide that matter, nor to his Counsel, if he have one; it must, therefore, rest with the Judge, and be determined by his judicial discretion. But in truth, so weighty a doctrine cannot be based on so narrow a ground. The benefit to the prisoner which the rule in question, or any rule upon the subject can contemplate, must be a benefit (like the indulgence granted in *Kinlock's case*), which is consistent with the benefit of the public and the promotion of justice, an indulgent advantage to him of all the protection which the law intends for innocent parties, but not a door by which to enable the guilty to escape. The evident urgency of the case in the advancement of impartial justice, and the necessary and indulgent protection of the prisoner are, the circumstances by which the discretion of the Judge should be guided in departing from the general rule, and that such was the opinion of the Judges who decided *Kinlock's case* is plain to my understanding; they acted manifestly on *Lord Coke's* rule as a rule which was to govern their discretion, and not to deprive them of discretion—(*Foster*, 27). “They agreed, that admitting the rule laid down by *Lord Coke* to be a good general rule, yet “it cannot be universally binding, *nor is it easy to lay down* any rule that “will be so; the rule cannot bind in cases which would be productive of “hardship or manifest injustice to the prisoner,” to which I may add, in the language of *Eyre*, C. J., “or the necessity of departing from the strict rule becomes apparent;” *Hardy's case* (a).

Now, what can we understand by “a general rule not universally binding,” a rule that may be departed from when it becomes apparent to the Judge that it is necessary to depart from it? Must it not be a rule which generally binds the Judge, but which he may dispense with when in his judicial discretion he sees that the ends of justice require him so to do? If it were a rule, the departure from which would create error, it must be a rule universally binding; it should be a rule like the rule of law which makes the eldest son the heir of his father, a rule from which no Judge can deviate, as to which he has no discretion. But the rule we are considering is like the rule of law which says that fines and imprison-

(a) 24 St. Tr. 414.

ments must not be unreasonable; and yet, in numerous cases, the Judge admeasures the fine and imprisonment of the convicts according to his judicial discretion. The law, at the same time that it vests a discretionary power in the Judge to admeasure the punishment, lays down a general rule to guide his discretion, and he is as much bound to observe such general rule as he is to observe these peremptory rules of law from which he has no discretion to depart.

Thirdly. Again, the language of the Judges in *Hardy's case* tends to the same conclusion. Eyre, C. J., after laying down the general rule says, "I shall never willingly depart from, nor consent to depart from "it but in a case of extreme necessity, and when, therefore, the necessity "of the case will justify a deviation from the strict rule of law." If the rule adverted to were a peremptory inflexible rule he could not deviate from it, and it would be absurd to talk of being unwilling to consent to depart from it.

Fourthly. The resolution of the Judges of England, as reported in *Carthew*, tend, in my mind, to the same conclusion. I am here assuming that such resolutions were actually entered into, notwithstanding the conclusions of *Sir M. Foster*; these were made not upon any case arising before the Judges for judicial determination, not upon argument of Counsel, but "upon debate between themselves," and seem therefore intended as rules for the government of their own discretion, and to produce uniformity of practice, and not as maxims of the common law; and, accordingly, it is observable that every one of the three resolutions reported in *Carthew*, 465, has been departed from in modern practice. Thus, first, in *Kinloch's case*, a capital case, a Juror was withdrawn upon consent, contrary to the first resolution. Secondly, the modern practice altogether repudiates the doctrine of withdrawing a Juror by consent in misdemeanour cases, *Rex v. Woolfe*, contrary to the second resolution: and thirdly, in civil cases, it is every day's practice to withdraw a Juror without consent, *Cook v. Caldecott* (a), contrary to the third resolution. This continual shifting of practice and variation of rule is strong to show that there is, and has been, no inflexible rule of law upon the subject, but that the rules are themselves deduced from the decisions of Courts of Justice exercising judicial discretion upon the matter; and it would therefore appear that the resolutions reported in *Carthew* are like those resolutions adopted by the Judges of England upon the passing of the Prisoners' Counsel's Act, rules for the guidance of their own discretion, and to produce uniformity of decision; but the departure from which could not be matter of error.

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(a) 4 Car. & P. 317.

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Fifthly. The opinion of *Sir M. Hale* is express, that the rule as to discharging Juries is a rule of discretion: 2 *Hale*, 295. But then it is argued that that opinion is to be disregarded, because he exalts this doctrine of discretion to a height which modern Judges and modern practice has altogether condemned. It is quite true that the doctrine and practice of *Hale's* day upon this subject, tended to oppression and injustice, and has in latter times been justly and universally reprobated. But still it shows that in *Hale's* opinion the discretionary power did exist; and upon a subject of criminal law, whose opinion is entitled to more weight? And let those who criticise this great and good man recollect, that *Hale*, in the passages referred to, is describing an existing practice as administered by the Judges of his own time; and that if he seems to approve of it, and even to assign reasons for its exercise, he does so on the ground and for the purpose only, that thereby the administration of criminal justice may be promoted. *Hale's* testimony in favour of discretion is not the less explicit or convincing, because he shows that the discretion had been abused, and that the tendency of the times was to make an oppressive use of it.

Sixthly. The opinion of *Sir M. Foster* on a subject of this description is entitled to the greatest weight, and that opinion is manifestly in favour of discretion. In p. 29, he says, "The general question is a point of great difficulty and of mighty importance (that is the power of the Court to discharge Juries), and I take it to be one of those questions which are not capable of being determined by *any general rule* that has hitherto been laid down, or possibly ever may. For I think it *impossible* to fix upon *any single rule which can be made to govern the infinite variety of cases* which may come under this general question, without manifest absurdity, and in some instances without the highest injustice." And he goes on to add that most of the objections (made in the case then before him) are levelled at *the improper exercise of the power*, and do not reach this present case. And in p. 34, after showing the exercise of discretion in the Court, as to admitting approvers, he says, "and yet we see that in a matter of *mere discretion* the Court did frequently, upon the circumstances, discharge Juries after they were charged and had in part heard evidence;" and again he says, after citing instances, "These do show in part what I hinted in the beginning, that no general rule can govern *the discretion* of the Court on this subject in all possible cases and circumstances." In conformity with these opinions is the high authority of Lord Tenterden, in the case of *Res v. Cobbett*; after fifteen hours' confinement, and upon the Jury informing him that they could never agree upon a verdict, Lord Tenterden discharged the Jury; this was, to be sure, a misdemeanour case; but the principle must be the same: 3 *Burns'*

Justice, 9th Ed. 975. The same learned Judge says in *Rex v. Woolfe* (a), "It seems to me that the law has vested in the Judge *the discretion of saying*, whether or not, in any particular case it "may be allowed to the Jury to go to their separate homes during a "necessary adjournment for the night." Can any body doubt Lord Tenterden's opinion on the subject? Two cases are relied upon by the prisoners' Counsel, as opposed to this discretionary power being vested in the Judge, *Rex v. Wardle* (b), and *Rex v. Kells* (c); but they touch not the point. In *Rex v. Wardle*, the Crown had omitted to challenge an exceptionable Juror, and after the Jury being sworn, and after the prisoner being given in charge, the Judge is called upon to discharge the Jury, because the unchallenged Juror was the prisoner's relation, the Court says, most properly, "it cannot be done." In *Rex v. Kells*, according to the more accurate *M.S.* report of my Brother Perrin, it would appear that the Twelve Judges thought that the Judge below should not have discharged the Jury, because a witness for the Crown was taken ill, and unable to complete his examination, and thereupon they advise that the prisoner shall be discharged from the indictment: this is accordingly done; but it decides nothing but what we all admit, that in the case of *Rex v. Kells*, the Judge had made a mistake, and it was humanely recommended that the prisoner should not suffer by it. I close this reference to the authorities on this part of the subject by reading the following passage from *Doct. and Stu.*, c. 52:—"And "if the Jury will in nowise agree, I think that the Justices may "set such order in the matter as may seem to them, by their discretion, to stand upon reason and conscience, by awarding of a new inquest, and by setting a fine upon them, that they shall find in default, or otherwise, as they shall think best by their *discretion*: "like as they may do if one of the Jury die before verdict, or if any "other like casualties fall in that behalf." This (and it is no mean authority) is a direct and explicit assertion of the doctrine of discretion; and the entry made in *Shields' case*, "*that the Jury could in nowise agree*," is manifestly founded on this passage; and recollect, *Shields' case* was before the same Judge, who discharged the prisoner in *Rex v. Kells*.

But secondly, whether this discretionary power does or does not exist in the Judge, can a mistaken discharge of the Jury be deemed equivalent to an acquittal? Let us take the case of a special verdict in a capital case, and suppose the verdict imperfect, so that no judgment can be given upon it, what is to be done? The Jury were discharged upon

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(a) 1 Chitt. 421.

(b) Car. & Marsh, 647.

(c) 1 Cr. & Dix, 151.

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giving in their verdict. The case is brought by *certiorari* into the Queen's Bench—what is to be done? A *venire de novo* is the proper course—so says Hale, C. J., in *Keat's case* (a); and such is the doctrine laid down in *Rex v. Hayes* (b). Mr. Chitty indeed expresses a doubt whether in a capital case a *venire de novo* ought to issue (c); but he admits that the discharge of a Jury who have found an imperfect verdict, is no answer to a new indictment for the same offence; and such is the doctrine expressly held and acted upon in the case of *Rex v. Burridge* (d), a case of felony, and so it is laid down in *Com. Dig. Indictment*, N. Mr. Chitty's doubt would seem now to be set at rest by the late judgment of the House of Lords in *Rex v. Gray*, and the cases lately ruled in this Court, in conformity with that decision. Now, I own that the case of an imperfect verdict, and a discharge of the Jury thereupon, seem to me not to differ in principle from the case of a non-verdict by reason of the disagreement of the Jury, and their discharge thereupon by the Judge. It is because an imperfect verdict amounts in law to no verdict, that a *venire de novo* issues; and shall it be said that the mere form of a verdict shall make the difference? And if it be urged that the imperfect verdict is a mistake of the Jury, and therefore to be remedied by a *venire de novo*, whereas in the present case the mistake is by the Judge; I ask, where is the principle of law to be found, which asserts that the mistake of a Jury is curable by a *venire de novo*, and that the mistake of the Judge is not curable by the same means? although perhaps I might say, that an imperfect verdict is as much the error of the Judge as of the Jury, for no verdict can be recorded without the sanction of the Court; but in the case of *Rex v. Gray*, the mistake was the mistake of the Judge. But the true and rational doctrine is, that where a trial proves abortive in consequence of no legal verdict being given, a *venire de novo* ought to go, whether the result has flowed from the error of the Judge or the Jury, or of both.

But it is objected that the humane principle of our criminal law is, that the life of a prisoner shall not be twice put in jeopardy, as it is contended by the prisoners' Counsel has been done in the present case. Now, I admit at once the principle, but I think that in this case the prisoner's life has not been twice in jeopardy, although in popular language twice tried, yet in contemplation of law the prisoners have had but one trial, that upon which they were found guilty. Such is the averment of this record, and such is the legal conclusion from what appears on the pleadings. To constitute a trial, not popularly but legally, there must be a verdict followed by a judgment. But let me try what is

(a) Skinner's Rep. 667.

(c) 1 Cr. Law, 654.

(b) 2 Ld. Raym. 1521.

(d) 3 Pr. Wms. 439.

meant by this principle, that the prisoners shall not be twice put in jeopardy ; and first, I try it by seeing to what cases the principle does not apply ; it is clear, first, that it does not apply to the case of a defective indictment or defective process. Why ? Because the prisoner's life, although perilled by the proceeding, was not in legal contemplation endangered (a). Secondly, it does not apply to the case where upon a good indictment there has been an acquittal, not upon the merits, but upon the ground of a variance, or of the venue being laid in a wrong county. In such cases, notwithstanding an acquittal, the prisoners may be tried again upon a new indictment: *Rex v. Sheen* (b). In those cases the prisoner's life was held not to have been in jeopardy, because he could not properly have been convicted upon the first indictment, although he was formally tried for and acquitted of the charge. Thirdly, it does not apply to the case of an imperfect verdict, as already shown : *Com Dig. Indict. N.* Why is this ? Because, in point of law, the prisoner, in such a case, has never in fact been tried. Trial, means a complete and finished trial, and when there is no verdict, there has been in law no trial. In all these cases the prisoner's life has not been in actual jeopardy, and the ends of public justice have not been satisfied either by an acquittal or a conviction. The true meaning of the rule that the prisoner is not to be put twice in jeopardy for one and the same offence, is given in *Sir Wm. Withipole's case* (c). It was contended in that case by the prisoner's Counsel (the prisoner having been arraigned upon an indictment for murder), that he ought not to be arraigned upon this indictment, because he had been *autre fois araign* upon an inquisition of murder found before the Coroner, and had pleaded thereto, &c., and so concluded his plea by pleading not guilty thereto. But it was held by all the Court that this was no cause of plea, for where he is not convicted or acquitted he may be arraigned upon a new indictment, and such also is the doctrine of *Vaux's case* (d), where it is laid down that a man's life was not in jeopardy by a proceeding which did not show a lawful acquittal or conviction. To make such a case, the prisoner must show that he was "*legitimo modo acquietatus or convictus*," that is by due course of law ; and although that case has, on another ground, been criticised, there is no authority which can traverse the doctrine now stated. It is upon this sane doctrine that the prisoner is put upon his trial again, in a case in which a Jury have been discharged upon the sudden illness of a Juror ; and the principle of law which requires in such cases a *venire de novo* is equally applicable to the case of a premature discharge of a disagreeing Jury : and this leads me now to examine more closely the

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(a) 1 Chitt. Cr. L. 756.

(b) 2 Car. & P. 634.

(c) Cro. Car. 147.

(d) 4 Rep. 45, a.

E. T. 1845. legal character of the defence put upon this record on the part of the
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It is clear that the plea of *autre fois acquit* does not apply to the case before us, more than the plea of *autre fois convict*; and yet the prisoners claim a judgment of acquittal. That plea is expressly founded upon the principle, that a prisoner shall not be put in jeopardy a second time for the same offence, which did not occur in this case: but is there a third class of pleas upon which a prisoner may rely against being put upon his trial a second time? Can the prisoner, in any case, rely for his defence upon the fact of a previous abortive trial? I may say, without fear of contradiction, that there is *neither precedent nor authority* for such a plea. *Kinloch's case* was a motion in arrest of judgment, and was (as I think I have shown) no authority for such a plea as that now before us. This is a plea which claims an acquittal for the prisoners on the ground of a former abortive trial. To hold such a plea good, is to put an abortive trial on the same footing (as a defence) with that of a completed trial, and indeed to give to such a plea a greater force than could be given to the plea of *autre fois acquit*. For it is clear law, that a mere plea of a prisoner's acquittal for the same offence, would be a bad plea; this point has been solemnly ruled in the case of *Rex v. Wilday (a)*. It is clear law, and so held in that case, that the plea of *autre fois acquit* must set out the judgment of acquittal, and will be bad unless it appear on the face of the record that the acquittal is founded on a *verdict*. "It must be" (says Hale *(b)*, as to the plea of *autre fois acquit*), "an acquittal upon trial either by verdict or battle."—The form of the plea and its averments show what by the common law was required to make the defence of a former acquittal—viz., *a trial and a verdict, and a judgment thereupon—quod eat sine die*; and in this case we are called upon to pronounce *that* judgment in a case where there was no previous verdict and no completed trial; and that too in a case in which the prisoners have, after a solemn trial, been pronounced guilty by the verdict of a Jury. That verdict of guilty cannot, however, influence this case, if the act of the Judge in discharging the Jury amounted in law to an acquittal of the prisoners; that is what the prisoner asserts by this plea: it is not a case for a *venire de novo*; the *venire de novo* did issue, and it is against the trial on that *venire* that this plea is put in. But if this plea be good, I ask would not the same argument sustain a plea alleging any other case of a premature discharge of a Jury; a plea, for example, stating a discharge upon the supposed ground that a Juror was suddenly ill, whereas in point of fact he was not so *ill*; or that the evidence of his illness was not such as to warrant the Judge in discharging him and the rest of the Jury: in truth,

(a) 1 M. & S. 183.

(b) 2 vol. §46.

the case in principle must be ultimately brought to this upon the prisoners' argument, that the discharge of a Jury by a Judge, after the prisoners being given in charge to them, is *equivalent in law to a verdict of acquittal*; and if so, it would follow upon every case where a Jury disagreed and were discharged, and the discharge was stated upon the record, that it should be followed by a judgment *quod eat sine dis.* Suppose the Jury, without the authority of the Judge, had discharged themselves on the second day, or one absented himself for an hour, could the prisoners avail themselves of that discharge? That will not be contended; and yet how in principle do the cases differ? one is the mistake of the Judge, the other that of the Jury.

Suppose the Judge, in a capital case, to take a privy verdict of guilty from a Jury, and then discharge them, that would be a violation of the rule of law as laid down by Lord Coke; but could the prisoner rely upon that transaction as a defence? The verdict might be deemed a nullity, and a *venire de novo* the result; but will it be contended that the prisoner, in answer to further proceedings against him, could plead that transaction as a defence? My opinion is, that a premature or irregular discharge of a Jury cannot be made equivalent to an acquittal by verdict; it may be the subject of another consideration by another tribunal, or in a different quarter; but it is not matter of defence by way of plea. The Crown's replication in this case is said to be defective in not showing circumstances to raise the case of an evident necessity for the discharge. Take it to be so, and let me suppose that a case had been stated in the replication of the illness of a Juror, and a discharge thereupon, and an issue in fact taken by the prisoners upon that replication, the propriety of the discharge would then come to be triable by a Jury; and the act of the Judge in discharging the Jury would be examinable by a new Jury upon every occasion. I need not dwell upon the inconvenience of such a doctrine.

But let us now look to some of the consequences of holding that in this case the Judge had no discretion to discharge the Jury, under the circumstances stated upon this record. I may ask then what, under the circumstances, should the learned Judge have done? If it is said, as it has been, he should have kept them longer in custody, I ask then how much longer? Until the Jurors, or one of them, becomes from illness incapable of acting, or until all the other business of the Assizes was concluded? Or should the Judge have carried the Jury with him, after the other business was concluded, to the bounds of the county or further? And in the meantime should the Jurors be allowed meat and drink, fire and refreshment? No answer is suggested by the prisoners' Counsel to any of those questions; and none, for the reasons stated by Sir M. Foster, could be assigned. The discharge in question is stated to be a violation of a fixed and peremptory rule of law, and yet nobody can tell what that

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fixed rule is ; it has been continually varying and shifting according to the discretion of Judges from time to time, and yet it is said not to be a rule of discretion, but an unbending rule, the departure from which is *error*. Suppose first, the Judge had waited twelve hours longer for the verdict, would that have satisfied the rule ? Plainly not (according to the argument), as long as life and health remained to the Jury, and as there was other business to occupy the Court. Well, then, is it to be laid down that it is error to discharge a disagreeing Jury until they, or some of them, become so ill that they become incapable of acting ?

First. This would be, I apprehend, a most alarming position for this Court to lay down. How could we expect conscientious men, with such a penalty before their eyes in cases of disagreement, to attend, and to discharge the duty of Jurors ? The Juror's office at the best is an onerous and thankless office, but with such a doctrine laid down as is here supposed, who would not rather submit to a heavy fine than attend as a Juror upon a capital case ?

Secondly. Again, see the danger of a Juror who may, honestly, differ from others of the Jury, being induced under apprehensions of danger to his life or health to relinquish his conscientious convictions and agree to a verdict which he believes to be an erroneous one.

Thirdly. It is most unreasonable to expect, after the lapse of many hours of discussion or disputation, after a night spent without rest, fire, or refreshment of any kind, that Jurors exhausted (as they must be) in body and mind, and who then in open Court publicly declare that they have not, and cannot agree in a verdict ; it is, I say, most unreasonable to expect that men so circumstanced can, by a sentence of imprisonment and starvation until they are agreed, or until they, or some of them, become seriously ill, be brought to agree in a just and satisfactory verdict. This doctrine of punishing a Jury into agreement is monstrous, unconstitutional and absurd.

Well, then it is said, confine them until the end of the Assizes ; but at Cork the Assizes continue sometimes for three weeks or more, and suppose a trial to take place in the first week and a Jury to disagree, are they to be kept in ward for the remaining fortnight, on the chance of an agreement within that time ? and if they are not to be kept so long, where is the limit ? In places indeed, where the Assizes last but a day or two, the hardship and inconvenience may not be so great, but in such a place as Cork, the practice here supposed presents an insuperable difficulty. But again, are the Jury during their confinement to be refreshed by needful food ? or are they to remain, according to the old rule, without meat, drink, fire, or other refreshment ? This is indeed a most serious consideration. If the old rule be to be strictly adhered to, the confinement of the Jury cannot, in general, last many days, because the death or dangerous illness of some of them must, before many days

can elapse, procure their discharge. Is then the Judge to wait for the fatality of the death or illness of a Juror, or is he to order them refreshments? for one or the other course he must, according to the argument, pursue. The practice upon this subject stands, I must say, in a very unsatisfactory state. Some of the Irish Judges have, of late years, allowed refreshments to an imprisoned Jury; some on a more liberal, some on a more moderate scale. I believe it is not so done in England. Now, if a Jury are supplied from day to day in their jury-room with needful support, a strong healthy dozen may, no doubt, be kept alive, and even well for a fortnight or more, and until the end even of the Cork Assizes: at whose expense they are to be thus maintained it is not so easy to understand; the county is not bound, indeed cannot, by law make presentment for their support, and some of the Jurors may be Jurors unable to provide themselves, thus separated from their families and their sources of ordinary supply: and can it be gravely contended that an imprisonment of a disagreeing Jury, under such circumstances, for many days or weeks tends to advance justice, or to benefit the prisoner?

The 55 G. 3, c. 42, s. 35, has been referred to in the argument, but I think no inference favourable to the doctrine of imprisoning Juries can be deduced from it. The enactment can aid us but little, for the trial by Jury was new in Scotland; but the language of the section is rather calculated to limit a supposed existing discretion in the Judge, than to give him a new power. Its terms are, that after twelve hours, &c., "he *shall* discharge the Jury, unless the whole Jury desire further time to consider their verdict;" it is not that he *may* discharge the Jury. But again, will those who deny to the Judge the discretionary power of discharging a Jury, will they say that the Judge has the discretionary power of ordering refreshment for them? the latter is as much against the old practice as the former. The bailiffs who keep the Jury are sworn "to keep the Jury without meat, drink or fire, candle-light only excepted," 2 *Gabbett*, 524. In *Hardy's case* (a), Eyre, C. J., says, before the Jury retired, "Gentlemen, I must apprise you, that after you have withdrawn there can be no refreshment given to you; do you want to take any moderate refreshment before you withdraw?" And so lately as *Frost's case* (1840), as the Jury were about to retire, Tyndal, C. J., says, "Gentlemen, if you wish before you retire, to take any refreshment, you can *now* do so; after you have once retired from the jury-box you cannot be permitted by law to have any refreshment until you agree in your verdict." But whether the Jury are to be refreshed during their confinement, or whether they are to be starved with the expectation of causing an agreement to a verdict—a verdict, the result of such measures may satisfy the form of the law, but it is opposed to its

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(a) 24 St. Tr. 1384.

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spirit ; it is repugnant to every principle of humanity and justice. Now, all these difficulties grow out of the doctrine which would tie up the hands of the Judge by a fixed and unbending rule of law ; and all are removed by the theory which vests a discretionary power in the Judge to deal with every case according to its special circumstances.

Again, I ask, how it is possible to reconcile with the doctrine contended for, the numerous cases in which Juries have been discharged by the mere authority of the Judge ? Thus in *Rex v. Edwards (a)*, a capital case, after evidence given a Jurymen fell down in a fit, and it was stated on oath to the Judge, "that it would be improper for the Jurymen to proceed with his duty as a Jurymen *on that day*." The Judge discharged the Jury, and proceeded to try the prisoner with a new Jury. The same thing was done in *Anne Scalbert's case*, upon an affidavit that "the deponent did not *think* the Juror would be able to attend the trial *immediately*:" in these cases there might have been an adjournment for a few hours, and possibly then the Juror would have been able to discharge his duty ; but the Judge exercising his discretion on the facts before him, discharges the Jury and proceeds with a new Jury.

The rule of law is against unnecessarily discharging Juries ; it is also against unnecessary postponement : the Judge must depart from either one or the other, and his discretion led in these cases to discharge the Jury. In *Rex v. Stokes (b)*, a case of manslaughter, after the Jury was charged with the prisoners, upon a representation of the prisoners that a material witness was absent, Baron Gurney (after consulting Tyndal, C. J.) discharged the Jury. This is another instance of the proper exercise of judicial discretion. *Whitbread's case* and others have been cited, where the judicial discretion has been improperly exercised ; but, as Foster says, it is against this improper exercise of the power, and not the power itself, that objection can be sustained. Take the case of a Juror becoming intoxicated ; of the Judge becoming unwell ; of the prisoner becoming ill, and the numerous cases that may be put of a like kind. What are they all but instances of cases in which the Judge exercised the discretionary power vested in him by the law of the land ? The prisoners' Counsel class all these instances of discretionary discharge by the Court as if they were exceptions allowed by law to a fixed and peremptory rule of law ; but they can neither show the existence of any such fixed and peremptory rule, nor can they show how it was that these particular cases can be considered exceptions to it. We know what a fixed rule of law is, and we know what an exception to such rule is. The rule, though it may have exceptions, still retains its generality, and the exception as a rule has its generality also, and the Judge has no discre-

(a) 4 Taunt. 309.

(b) 6 Car. & P. 151.

tion to dispense with either. Thus, there is the rule of law that a wife cannot give evidence against her husband, and no Judge can break in upon that rule by his judicial authority; however hard or inconvenient it may be to apply it in a particular case, it cannot be impugned, it is a fixed rule. But there is a rule operating as an exception to this, and as well recognised as the rule itself, viz., that when the wife has been the subject of criminal violence on the husband's part, her evidence in such case is receivable against him, and no Judge can refuse that evidence. The two principles of law come here to operate together, and the one is as stringent and unbending as the other. Neither of them admits the rule of discretion, but it is not so with the rule as to discharging Juries, and the supposed exception to it. The former is unfixed, uncertain and perpetually varying; the latter, called exceptions, are admitted instances of discretionary power. It is, in my opinion, therefore, impossible to reconcile the nature of such an inflexible rule, the deviation from which is error in law, either with legal principle or decided authority. The necessities of each particular case and the exigencies of justice require the application of a power which may be commensurate with the ever varying circumstances of particular cases, and that power can no where be so safely or conveniently placed as in the discretion of the Judge.

But then it is strongly urged, that it is dangerous as well as unconstitutional to lodge this great power in the hands of an individual Judge; and much eloquent indignation is expended upon *Whitbread's case*, and others of that period. That the power has been abused, and may again be abused, there can be no controversy; as what judicial or other power may not be? But somewhere it must be lodged, in order to prevent injustice and injury, and where else can you place it with equal security? And secondly, I cannot see that it is a more important or serious discretion than in many other cases is necessarily and confessedly vested in the Court. How serious is the Judge's responsibility as to the admission or rejection of evidence in a criminal case? The verdict of a Jury, life or death, may hang upon the Judge's determination in this matter. How serious is the Judge's responsibility upon a motion made to postpone a trial in a capital case? And yet, there is no appeal from the Judge's order. How painful is the duty of awarding a due measure of punishment in the numerous cases in which the measure of punishment is discretionary, cases in which the law casts upon the Judge as well the office of fixing as of pronouncing the sentence? All these (and many others might be mentioned) are cases in which the discretion is vested in the Court because there is no other mode by which it is possible to have one just rule fitly applicable to each particular case. I would say here in the words of Lord Tenterden, in *Rex v. Woolfe* (a), "It seems

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"to me, that *the law has vested in the Judge the discretion* of saying "whether or not, in any particular case it may be allowed to a Jury to (separate and) go to their homes during a necessary adjournment throughout the night; there are many cases in which the law vests discretion in the Judge; those who fill that office (I am sure I may so say of myself) consider themselves bound by the rules of law, and the less they are armed with discretion, the more satisfactory to themselves are the duties they have to perform." This doctrine, applied by Lord Tenterden to the separation of Juries before the trial concluded, applies with equal stringency to their final separation when no verdict can be had.

Upon the whole, my opinion is, that there has been no error in law committed by the discharge of the Jury in this case; it makes no discontinuance on the record; it is no acquittal. I have no doubt that the learned Judge who, in this case, discharged the Jury, did so because he thought that a case of evident necessity for their discharge had arisen at the time when he permitted them to go at large. Perhaps the circumstances of that necessity are not as fully and as satisfactorily before us on the pleadings in the cause, as they would have been, had the proper entries, under the Judge's directions, been made in the Crown-book by the Clerk of the Crown; and the case been brought before us in a more regular form: a case of evident necessity might probably have been pleaded fully and formally; but enough appears to satisfy me, that upon its appearing to the Judge that after a night's confinement in the Spring season without fire, meat, drink or other refreshment; and after a public declaration in open Court by the Jury that they could not agree to any verdict, and in the exhausted and enfeebled state in which they must have appeared on the second day before the Judge, that he was well warranted in considering that "the Jury could in nowise agree," and a case of evident necessity for their discharge had arisen. But, whether or not this case of evident necessity sufficiently appears upon this record, I rest not on: on that point I think the presiding Judge alone was competent to decide. He has decided it, and this Court has no power to review his decision in that respect. The pleas in the present case, therefore, which are founded on the notion that the Judge had no such discretionary power, are, in my mind, untenable; and even if there was an improper exercise of his discretion by the Judge (and I am far from saying that there was), yet the exercise of that discretion cannot amount to error in law; nor can an abortive trial, without a verdict, be placed (as a defence) on the same footing with an acquittal by verdict. The old rules of practice adopted in times when cases were few and simple, and trials of short duration, are utterly unsuited to the complicated cases and long trials of modern times; and for my own part, I would rather look to the great principles of justice and common sense, than root in rubbish of barbarous antiquity for the rule by which, in our enlightened days, the administration of

justice should be guided. I am of opinion that there should be judgment for the Crown.

BURTON, J.

In this case, I cannot but feel considerable difficulty—a difficulty that has not been altogether removed by the able discussion of the subject at the Bar, and the observations that have been made upon it by my learned Brothers; and with respect to which I have only to say that, strongly as I feel the force of my Brother Crampton's reasoning, my own judgment on the case is in accordance with that of my Brother Perrin.

The case, as it appears upon the record, has been fully stated, and may therefore, in my view of the case, be very briefly adverted to.

The prisoners were brought to trial at an Assizes held in and for the county of Limerick on the 2nd of March, in the seventh year of the Queen, on an indictment for the murder of Charles Dawson. To that indictment they severally pleaded that they had been brought to trial at a former Assizes in Limerick (on the 2nd of March 1843); that a Jury appeared and were duly sworn, and that witnesses were examined on the part of the Crown; and that the said Jury having been so duly sworn, empanelled and charged, were discharged; not by reason of any fatality or misconduct, or request of the prisoners, or for or by reason of any fatality of the Jurors, or any of them, or of the Justices of Assize, or either of them, or for or by reason of any other sufficient or legal cause whatever: and they therefore prayed judgment that they (the prisoners) might be discharged without a day from the premises in the indictment, and that the same might not be further prosecuted against them.

To those pleas, replications are put on the record on the part of the Crown, and which may be considered together, and stated substantially and generally, thus:—It is stated by them that the Queen ought not to be barred from further prosecuting the said indictment; nor ought the prisoners to be discharged, or to go without a day, for or by reason of any thing in their pleas alleged; for that after the time of the giving the prisoners in charge, and before the Jury were discharged of the prisoners, divers witnesses (specifying them) were duly sworn and examined, and gave evidence in open Court on the part of the Queen; and that divers witnesses (specifying them) were also examined on the part of the prisoners, and that all the evidence was duly left and submitted to the consideration of the Jurors. That the Jurors were then duly charged by the Justices, and the Jurors by the direction of the Justices retired from the Court into their private jury-room for the purpose of deliberating in private upon their verdict; and that the said Jurors from thenceforth remained in their said private room separate and apart from all other persons, and without meat, drink, fire, or other refreshment for a long space of time—to wit, for

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twenty-four hours ; and that after a lapse of a much more than sufficient and reasonable time for enabling them to consider and fully deliberate upon their verdict, and to agree upon it ; they, after twenty-four hours had elapsed—to wit, on the 3rd day of March 1843, being the day next after the day on which the prisoners were so given in charge to the said Jurors, they (the said Jurors) came from their private room into the open Court, and there, in the presence and hearing of the Justices, and in that of the prisoners, declared that they (the Jurors) had not agreed upon their verdict, and that they could not agree together upon any verdict concerning the said indictment ; and that they had not agreed, and could not agree together, or find or say upon their oaths whether or not the prisoners, or either of them, were or was guilty ; and that afterwards, and after the lapse of the said time, being more than a reasonable time for the Jurors considering and deliberating upon their verdict, and after the Jurors had so declared in the presence of the prisoners, that they could not agree upon any verdict, the Justices in the said open Court, without any objection being made by or on behalf of the prisoners, and on their (the said Justices') own authority, and in the exercise of their discretionary power and authority, and without the consent of the prisoners, and also without any consent on the part of the Crown, did in open Court release and discharge the said Jurors from finding any verdict, and ordered that the said Jurors should be allowed to separate and go at large. And thereupon the said Jurors then and there separated, and went at large without finding any verdict upon the said indictment.

The replication to the second plea of the prisoners, stated the length of time during which the Jurors remained to deliberate on their verdict to be twelve hours ; but added, that their deliberation continued until all the other business of the Assizes had finished and been concluded, and when the Sabbath-day was drawing near.

To those replications the prisoners demurred generally, and judgment was given for the Crown, and the prisoners were thereupon sentenced to death ; and upon that judgment the writ of error is brought, which is now before us.

The question then arising upon the record is, whether the Jury were discharged upon sufficient grounds or not ? and if not, whether the prisoners are entitled to the benefit of that discharge to the extent of its operating towards them as an acquittal ?

It may be observed here, that every thing that took place upon the subject of the prisoners' discharge, as it appears upon the record, was in the presence and hearing, and with the concurrence of the *two* Judges before whom the Assizes were held. That, probably, strictly speaking, may not have been the case, but it being so stated, and not denied upon the record, we may, I think, so consider it ; and the rather, because it is at

least probable that both the Judges did confer together, and concur in the course that was adopted.

We are then to see what the legal grounds are, upon which a Jury duly charged upon the trial of prisoners indicted for murder, after a full hearing of the evidence on both sides, and receiving the directions or charge of the Judge, and having retired to deliberate upon the case, and thereupon to find a verdict, can be lawfully discharged from finding a verdict.

Now, with respect to this, the rule of law as it is found in the old and modern authorities upon the subject, is, that in capital cases a Jury once sworn and charged must give a verdict, and cannot, except upon evident necessity, be discharged, without at the same time discharging the prisoner from any future trial for the same offence.

In *Bacon's Abridgment*, tit. *Juries*, G., it is said that, "it seems "to have been anciently an uncontroverted rule, and hath been allowed, "even by those of a contrary opinion, to have been the general tradition "of the law, that a Jury sworn and charged in a capital case cannot "be discharged (without the consent of the prisoner) until they have "given a verdict; and, notwithstanding some authorities to the contrary in the reign of *Car. 2*, this hath been holden for clear law both in "the reign of *Jac. 2*, and since the Revolution." This statement is fully supported by the passage referred to in *Foster's Crown Law*, 23; and the rule is thus stated in 4 *Blackstone's Commentaries*, 360: "When "the evidence on both sides is closed, and indeed when any evidence "hath been given, the Jury cannot be discharged, unless in cases of "evident necessity, until they have given their verdict." We have then to look for the instances which have hitherto been considered as cases of evident necessity, and as such, warranting a discharge of the Jury; and as to this we find that if after indictment, arraignment, the Jury charged, and evidence given on a capital offence, one of the Jury becomes incapable, through illness, of proceeding to verdict, the Court of Oyer and Terminer may discharge the prisoner: *The King v. Edwards* (a); so if the prisoner himself fall down in a fit during the trial, the Jury may be discharged, and upon his recovery he may be tried by another Jury; so in *Elizabeth Meadow's case* (b), where the prisoner, during her trial for a capital felony, was taken with the pains of labour, the Court discharged the Jury; so in *Stevenson's case* (c), where the prisoner (the evidence for the prisoner being nearly closed) fell into a fit, which, by the report of the surgeon who was called in, rendered him incapable of being again brought to the bar for trial: the Court, thereupon discharged the Jury. We then come to a case where the necessity for discharging a Jury did not exist, and

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(a) 4 Taunt. 309.

(b) Foster, 76.

(c) Leach, 546.

E. T. 1845. therefore, only warranted an adjournment; that was the case of *The Queen's Bench. King v. Hardy*, for high treason, where the Court *adjourned* the trial, on its having ran into a length beyond the strength of man to bear *without meat* and sleep: and this (although in that case it was *done by consent*) was done in subsequent cases (of the same kind) without any consent by the authority of the Court itself, upon the maxim of "*Quod necessitas cogit, defendit.*"

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From these cases it appears to me that the true principle of an *evident necessity* for the discharge of a Jury in a capital case may be brought to the test; and with that view, the grounds of the discharge now in question may be examined by the facts put upon the record as warranting, or not warranting, the discharge of the Jurors in the case before us. It is stated in the replications that the prisoners were discharged by the Judges "in the exercise of their discretionary power and authority." Now, these terms cannot properly be considered as meaning any thing more than the exercise of their jurisdiction, and must leave the question as to the grounds of this exercise of jurisdiction open to examination, and accordingly the replications state those grounds, and which are the following; namely, that the Jury remained in their jury-room locked up for a long space of time, to wit, for twenty-four hours, which is stated to have been much more than a sufficient and reasonable time for enabling them to consider and fully to deliberate upon their verdict; and this may be presumed to have been the declared opinion of the Court. To this it is added, that the Jurors were kept during all that time without meat, drink, fire or other refreshment; and to this it is further added, that at the time of their being so discharged, all the other business of the Assizes had been concluded, and that the Sabbath-day was drawing near; to which is also to be added, the declaration in very emphatic and positive terms, that the Jury could not agree upon a verdict, and therefore could not find one.

Now, whatever this might lead to as the proper course, under the circumstances, to have been adopted, I cannot say, that to my mind it exhibits a sufficiently evident necessity for discharging the Jury. The lapse of time as being sufficient for the Jurors' deliberation on the case, even with their declaration that they could not come to an agreement upon the verdict to be found by them, has never yet been held, so far as I know of, sufficient for such a proceeding as the discharge of the Jury in a capital case; and it might, in my apprehension, lead to very inconvenient consequences if it were to be admitted to be so. The circumstance of that length of time having elapsed without any refreshment being given to the Jurors, is also in my mind insufficient, unless it should have produced some illness or infirmity, or at least the immediate probability of illness or infirmity in all or in some or one of the Jury; and such a case of actual or probable illness or infirmity might only amount

to a necessity for the allowance of some rest and sustenance, and consequently to some adjournment of the trial. Nor does the approximation of the Sabbath-day, as I apprehend, authorise or make necessary the discharge of the Jury, even though added to the foregoing circumstances, and also to the circumstance of the other business of the Assizes being concluded. They do not altogether, in my judgment, amount to such necessity in themselves for the discharge of the Jury, there not being shown any want of means for keeping the Jury together during the Sabbath-day; nor any necessity, nor even cogent reason for the Judges leaving the county without any further delay, and for that reason discharging them altogether.

Upon the whole, it appears to me, that to warrant the discharge of a Jury empanelled and sworn on a trial for murder, without having found a verdict, it must be a discharge under such circumstances as to make it a matter of necessity; and further, that if brought into question, that necessity must be made evident. In this instance, the necessity does not appear to me to be evident upon the record; and consequently, that the discharge of the Jury must be taken to have been, in this instance, not warranted; I mean by that term, not shown upon the record with sufficient certainty to be warranted: and the Jury having been thus discharged, and the prisoners' lives having been thus in jeopardy, they could not, as I conceive, upon the acknowledged principle of the common law, be legally tried and convicted on this indictment; and consequently that the judgment must be reversed.

PENNEFATHER, C. J.

In this case I state my opinion, certainly not without great difficulty, and great regret, that on a subject in which the public are so much interested, there does not appear to be a unanimity of opinion in the Court. We have heard very able arguments, and a great variety of principles enunciated, authorities and cases cited, and we have heard what has been stated to have been the practice in similar cases which have come under the consideration of the Courts, both in this country and in England, without being able either from ourselves, or from others, to draw any fixed rule upon the subject which would appear to be universally binding; I say universally, because I think, generally speaking, there appears to be less difficulty than may be found to exist in particular, or individual cases.

Various cases have been brought under the consideration of the Court, and the various circumstances in which the law stood in reference to this subject discussed; but it will be enough for me to state in somewhat general terms the law as existing *pro tempore*. We have heard mentioned the common law principles that did govern the rule that existed upon the subject; but I will not go through the various

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modes and gradations that took place with regard to the practice in the administration of justice connected with this subject. There were undoubtedly general rules laid down, which were afterwards found, if not absolutely necessary, at least it was found expedient to make a modification in. That there were extravagant rules existing, connected with this subject, which for many years were carried into execution, cannot now be denied. I think no man can now say that these rules ought, consistently with justice or common sense, to be any longer the law of the land; but are we at liberty, therefore, to consider, or to treat them as totally abolished? I apprehend not; and that we must, in the execution of the duty imposed upon us, adhere as far as possible to those rules once acted upon, and considered as law, and not unnecessarily to deviate from them, except when we have authority for saying that a modification has been introduced, which is to supersede the strictness of the original rule before existing.

Now, I shall state these rules very shortly, without reference to other rules not belonging to this case, which have been referred to or mixed with it. In *1st Institute*, 227, *b*, it is laid down that, "a Jury sworn and charged in a case of life or limb, cannot be discharged by the Court, but they ought to give a verdict." And in *3rd Institute*, 110, we find, "If a person be indicted for treason, or felony, or larceny, and plead not guilty, and thereupon a Jury is returned and sworn, their verdict must be heard, and they cannot be discharged." These rules are laid down by one of the most eminent lawyers, and he delivered this proposition in these absolute terms that I have stated, and in which other writers have followed him, and other lawyers have adopted his views upon the subject, and that continued to be the general rule of law in connection with this branch of the administration of justice. But in the time of *Blackstone*, if not before, there was a great qualification of these rules so laid down and approved of, generally speaking, by the Judges. At that time the better sense of succeeding periods produced this qualification in the rule then or theretofore laid down (and which was introduced as a qualification of the rule as it then existed). In the fourth volume of his *Commentaries*, p. 360, he says, "When the evidence on both sides is closed, and indeed when any evidence hath been given, the Jury cannot be discharged unless in cases of evident necessity until they have given a verdict."

The only qualification of the rule we have then to consider is, whether it appears upon this record that an evident necessity did exist, or had taken place, as preliminary to the exercise of the Judge's discretion? Now, from 1769, (the time that *Blackstone* wrote), up to the present time, not only has that qualified rule I have so stated, been acted upon, but it appears to have met with the judicial approbation of various Judges of the highest eminence (adopting the same rule), and exercising the same

discretion. In the case of *The King v. Edwards*, Lord Ellenborough, a Judge of no mean authority, and perhaps more distinguished in criminal cases than others, says, that the rule admits of an exception in the case of necessity. Now, what is the meaning of that? not that the old rule was abrogated, or done away with altogether, but that there was an exception to that existing rule; and that necessity must be shown to exist, before the application of the old rule will be enforced. In *Hardy's case* it was done upon consent, but in *Stone's case* the Judge did it of his own accord. Now, it is plain from the statement made by Lord Ellenborough in *Edwards' case*, and by the other Judges in *Kinloch's case*, and in that case at the Old Bailey that has been referred to, that they concurred, not in the abrogation of the old rule, not in substituting a discretionary power without control, but a discretionary power to be put into exercise upon the necessity of the case. *Edwards' case* was in accordance with that view of the subject; it was argued before all the Judges at the time, with the exception of two, and they stated that to be the unanimous opinion of the Court; and Taunton, J., said it was decided in so many cases that it was settled law. What was that settled law? not the exercise of a capricious power in the Judge, but that there should be established a previous necessity, as in the case of a Juror who could not proceed with his duty, being incapacitated by the act of God or otherwise from so doing. Therefore, I should say, in a capital case I will adhere to the rules so laid down, and I will not concur in making a rule which will admit of a Jury being discharged, "that discharge not being in favour of the prisoner," and no evident necessity being shown to exist. I do not mean to say but that very embarrassing matters, and very difficult to be answered, have been stated by my Brother Crampton; but considering that this is a capital case, and a case upon the record, it lies upon those who seek to apply to this particular case the introduction of a new rule, to establish its applicability most clearly and satisfactorily.

I cannot agree with the proposition which says, that under all, or under any circumstances, such a discretionary power is vested in the Judge, and that he has, without being responsible, a power of discharging a Jury, as has been done in this case. I think it a mistake to say that such a discretionary power exists at all times in a Judge, merely because he is a Judge; he must surely exercise his discretion in his judicial capacity. Suppose he exercises that power in such a capacity, is he at liberty on all occasions to exercise it as he may think fit? Suppose a Judge calls on a trial, and a Jury are sworn in a criminal case, and before the case is proceeded with, even before any witnesses are examined, it turns out that, owing to some pressing necessity, a Juror makes an application to the Court to be discharged by reason of what appears to the Juror an evident necessity for that

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discharge, is a Judge at liberty to grant such a request? could he do so? he would have no authority for so doing, yet the occasion might be such as would strike an unprofessional man with the necessity of acting upon it: perhaps it might be the sudden death of one of the Juror's family, or something equally necessitous which might claim his presence. I do not believe that there is any authority which can be cited, which is not distinguishable from the present case. There are wide distinctions between civil cases and a case of this description.

Here there is no averment of the existence of any necessity, as in *Shields' case*, that the Sabbath was approaching, or the Judge about leaving the town; nor that the time for discharging criminal business had expired. No such thing is put upon the record, and we are to take the contrary to be the fact. Then what is the case put forward upon this record for introducing a new power of discharging a Jury? It states the empanelling of this Jury, and that the prisoner was given in charge to them, and that thirteen witnesses were examined, and that no further evidence was offered, and that the Jury retired to their private room and remained there for a long space of time—to wit, for the space of twenty-four hours; there is no statement that the Jury came out in a state of exhaustion or illness; but the averment is that they remained in for a long space of time—to wit, twenty-four hours; that being laid under a *videlicet*, amounts to no definite space of time, though in point of fact, that statement is probably correct; for the record says, “the day next after the said Edmond Conway was so given in charge, the Jurors came out;” and that is the only averment as to time. Consistently with every averment upon the face of this record, the Jury might have been in perfect health and ability. True, some of the Jury might have become so exhausted that they were rendered incapable of further investigating the case; but there is no mention of the existence of such an incapacity; nor is there any averment of the necessity for the Judge going away, the business being over; and yet the Judge takes upon himself to discharge the Jury, without stating any other reason for doing so, except that there had been, in his opinion, a sufficient time for their deliberating upon and considering their verdict.

Now, is that a case of “evident necessity?” I apprehend that this is a case which falls short of it; and it being a capital case, I cannot extend the rule beyond that to which it has already been extended; therefore, my judgment must be with the majority of the Court, and against the Crown.

Mr. *Coppinger* applied for the prisoners' discharge, and the Crown consenting, they were accordingly released.

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Queen's Bench.

Lessee JAMES KING BELL, and others
v.
EJECTOR.

June 11.

MR. JAMES C. LOWRY applied on behalf of the lessors of the plaintiff for liberty to amend the first and fifth demises in the declaration in ejectment in this cause, by striking out the words, "An infant under the age of twenty-one years, by James Crooks Bell; his father and next friend." This was an ejectment on the title brought to recover possession of lands in the county of Tyrone; and the first and fifth demises are stated to have been made by James King Bell, an infant under the age of twenty-one years, by James Crooks Bell his father and next friend, which is incorrect; they should have been stated to have been made by the minor himself. No defence has yet been taken to the ejectment, which was only moved on the first day of the present Term, and no person can be prejudiced by the amendment.—[PERRIN, J. You are premature in your application; why not wait until defence has been taken?—If we waited until defence was taken, the defendant would be entitled to withdraw or amend his defence at our expense, and we should enter our rule *de novo*. Amendments have been frequently allowed by this Court before defence taken. In *Lessee Carroll v. Ejector* (a) the date of the demise was allowed to be altered from 1833 to 1837, without prejudice to the rules already served, no defence having been taken; and in *Lessee O'Brien v. Ejector* (b) an amendment was allowed before defence taken, by substituting the name of "William" for "John" in the description of the premises; and an amendment precisely similar to the present was allowed to be made after defence taken, in the case of *Lessee of an Infant, by his Guardian and next Friend, v. Smith* (c).

The Court will allow a demise in an ejectment to be amended before defence taken, without prejudice to the rules to plead.

PERRIN, J.*

Take the order, serving a copy of the amended declaration upon any parties who may take defence.

(a) 1 Ir. Law Rep. 117.

(c) 1 Ir. Law Rep. 380.

(b) 2 Ir. Law Rep. 329.

* *Solus*.

* T. T. 1844.
Queen's Bench.

Lessee LORD POWERSCOURT v. EJECTOR.

June 12.

On the death of the lessor of the plaintiff after the issuing of the *habere*, but before its execution, the Court will grant a renewal of the *habere*.

MR. HATCHELL moved for a renewal of the *habere* in this cause. This was an ejectment on the title, and one of the lessors of the plaintiff having died after the issuing of the *habere*, and before its execution, we are entitled to renew the *habere*, notwithstanding his death: *Chambers' Landlord and Tenant*, 805, and *Anonymous* (a); establishing, that where there are more plaintiffs or defendants than one, after the death of one of them execution may issue without a *scire facias*.

CRAMPTON, J.*—Take the order.

(a) 3 Salk. 319.

* *Solus*.

M. T. 1843.
Esch. of Pleas.

JOHN LOVELAND, Lessee of the Rev. JAMES WILLIAM
FORSTER, Clerk,

v.

THOMAS MAUNSELL WILSON.

(*Eschequer of Pleas.*)

Nov. 6.

EJECTMENT for non-payment of rent.—The declaration contained a single demise in the name of the Rev. James William Forster, which was laid on the 3rd of October 1842. The premises sought to be recovered in the ejectment were the glebe lands of the parish of Emly Grenan in the county and diocese of Limerick, containing 38A. 2R. 17P. Irish plantation measure.

The trial took place before Mr. Justice Jackson at the Spring Assizes for the county of Limerick 1843, when the Jury returned a special verdict, finding the following facts:—

That the Rev. Thomas Quinn, clerk, since deceased, at and previously to the several times of making three leases dated respectively the 25th day of July 1835, the 28th day of July 1824, and the 12th day of June 1813, and from thence until the time of his death, held and enjoyed the dignity of the treasurership of the Cathedral Church of St. Mary's in the diocese of Limerick, and was the treasurer of said Cathedral Church. That the corps of the said treasurership consisted of the rectory of St. Patrick's (having within it a perpetual curacy called St. Patrick's *alias* Kilquane), and of the rectories or parishes of Cahervalla and Emly Grenan, said several rectories or parishes constituting a union called the "union of St. Patrick's." That the revenues of said parishes or rectories respectively under the Act of the first and second years of the reign of her present Majesty, chap. 109, entitled "An Act to abolish composition for tithes in Ireland, and to substitute rent-charges in lieu thereof," at the time of the making of the order bearing date the 25th day of February 1841, hereinafter mentioned, were as follows:—First, the tithe rent-charge of St. Patrick's Rectory £256. 3s.; secondly, the tithe rent-charge of Cahervalla Rectory £157. 10s.; thirdly, the tithe rent-charge of Emly Grenan Rectory £112. 10s.; and that there was at the time aforesaid a further income belonging to the said treasurership arising from demised lands amounting to the yearly sum of £80. 6s. 1½d.; which

Where an order of the Lord Lieutenant and Privy Council, made under the Church Temporalities Acts, disappropriating the rectory of E. from the dignity of the treasurership of the Cathedral Church of St. M., contained a recital distinguishing the rents of the glebe lands from the other revenues of the rectory; and where the operative words of the Order in Council were—"the said parish or rectory of E., together with the rectorial tithes thereunto belonging;" *Held*, that according to the true construction of the Order, the word "rectory" did not include the glebe lands, and that therefore they did not pass to the Ecclesiastical Commissioners.

ers, but continued annexed to the treasurership.

The Lord Lieutenant and Privy Council have the power, under the Church Temporalities Acts, to make a partial disappropriation, by disuniting the tithes or glebe lands from the rectory.

M. T. 1843.
Exch. of Pleas.

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FORSTER
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demised premises the Jurors found were the lands demised by the said three several leases bearing date respectively the 25th day of July 1835, the 28th day of July 1824, and the 12th day of June 1813.

That the lease of the 25th day of July 1835, was made between the said Thomas Quinn of the one part, and the defendant Thomas M. Wilson of the other part, whereby the said Thomas Quinn demised to the defendant Wilson the glebe lands of the parish of Emly Grenan in the county and diocese of Limerick (being the lands and premises in the declaration mentioned), for the term of twenty-one years, at the rent of £55. 7s. 8½d., payable half-yearly to the said Thomas Quinn, and his successors, under which lease Wilson entered, and became possessed of the glebe lands for the term thereby granted; and that the Reverend Thomas Quinn received the rent up to the time of his decease.

That the said rectory of Emly Grenan, including the tithes and glebe lands thereof, was at and previously to the several times of the passing of the Acts of the 3 & 4 W. 4, c. 37, 4 & 5 W. 4, c. 90, 6 & 7 W. 4, c. 99, 3 & 4 Vic. c. 101, and at the several times of the making of said lease of the 25th July 1835, and of the death of the said Reverend Thomas Quinn; and of the making of the order of the 25th February 1841 (in Council), appropriated or united to the dignity of the treasurer-ship aforesaid.

That at the several times of the passing of the said several Acts, there was not, and that there had not since been, any vicar or curate in the parish of Emly Grenan; that the said lands demised by said lease of the 25th July 1835, were at and previously to the several times of the passing of the said several Acts of Parliament, and at the several times of making the said last mentioned lease, and of the death of said Thomas Quinn, and at the time of making said order of the 25th day of February 1841, the glebe lands of said parish or rectory of Emly Grenan.

That by lease, dated the 28th July 1824, made between the Rev. Thomas Quinn, therein described as treasurer of the diocese of Limerick, of the one part, and the defendant of the other part, the said Rev. Thomas Quinn demised to the defendant the glebe lands of the parish of St. Patrick's, in the diocese and south liberties of the City of Limerick, for the term of twenty-one years, at the yearly rent of £25 then Irish currency.

That by lease, dated the 12th of June 1813, and made between the Rev. Thomas Quinn, therein described as treasurer of said Cathedral Church of St. Mary's, of the one part, and the Dean and Chapter of the said Cathedral Church of the other part, the said Rev. Thomas Quinn demised to the said Dean and Chapter all that and those the plot

of ground situate in the parish of St. Mary's, Limerick, commonly called and known by the name of the "Treasurer's Garden," for the term of forty years, at the yearly rent of £2 then Irish currency.

That the said Thomas Quinn departed this life on the 22nd of January 1841, and that thereupon the dignity of said treasurership became void; and that on the 28th of January 1841, notice of the vacancy of said treasurership was, in pursuance of the provisions of the said Act of the 4th and 5th W. 4, c. 90, given to the Ecclesiastical Commissioners for Ireland by the Bishop of Limerick, being the person having the patronage of or right of appointment to said treasurership.

That on the 25th of February 1841, and while said dignity and office of treasurership was void, the then Lord Lieutenant and Privy Council of Ireland duly made an order, bearing date the day and year last aforesaid, and which order was in the following terms:—

"By the Lord Lieutenant and Council of Ireland, Ebrington; whereas
 "by an Act of Parliament, passed in the third and fourth year of the
 "reign of his late Majesty, King William the Fourth, entitled 'An
 "'Act to alter and amend the laws relating to the temporalities of the
 "'Church of Ireland,' it is, amongst other things, enacted that it shall
 "and may be lawful for the Lord Lieutenant or other chief governor or
 "governors of Ireland for the time being, and his Majesty's Privy
 "Council there, in the case of the deaneries of Down and Raphoe,
 "when and as they may so think fit; and in case of any and every
 "archbishoprick, bishoprick or other deanery or archdeaconry, dignity,
 "prebend or canonry, by and with the consent and approbation of the
 "archbishop, bishop, dean, archdeacon, dignitary, prebendary or canon
 "thereof; or whensoever such archbishoprick, bishoprick, deanery, arch-
 "deaconry, dignity, prebend or canonry, shall be void, to disappropriate,
 "disunite and divest any rectory, vicarage, tithes, or portions of tithes,
 "or glebes, or part or parts thereof, from and out of said deaneries of
 "Down and Raphoe respectively, or from and out of any archbishoprick,
 "bishoprick, or other deanery, or archdeaconry, dignity, prebend or
 "canonry, and to unite any such rectory, vicarage, tithes or portions of
 "tithes to the vicarages and perpetual or other curacies of said parishes
 "respectively; and whereas by another Act of Parliament passed in the
 "fourth and fifth year of the reign of his said late Majesty, entitled 'An
 "'Act to amend an Act made in the third and fourth years of the reign
 "'of his present Majesty, entitled an Act to alter and amend the laws
 "'relating to the temporalities of the Church of Ireland,' it is, amongst
 "other things enacted, that, where under the said Act or any other Act,
 "any parish in which there shall be any perpetual curate endowed, shall
 "be disappropriated or disunited from any ecclesiastical dignity or bene-
 "fice, such curate immediately upon such disappropriation or disunion and

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"by virtue thereof shall be and become rector or vicar, as the case may be, of the parish so disappropriated or disunited, and such perpetual curacy shall merge in the said rectory or vicarage. And whereas by a further Act passed in the third and fourth year of the reign of her present Majesty, entitled 'An Act to amend several Acts relating to the temporalities of the Church of Ireland,' so much of an enactment contained in the Act of the fourth and fifth years of the reign of his late Majesty King William the Fourth as empowers the Lord Lieutenant and Council to unite and annex any parish, tithes, or portions of tithes, or glebes, so as by said Act disunited, to any neighbouring rectory, vicarage or perpetual curacy, is by the said Act of the third and fourth years of her Majesty declared to be, and the same is thereby repealed; and it is by said last-mentioned Act enacted that in lieu of uniting and annexing any parish, tithes, or portions of tithes, or glebes so disunited, to any neighbouring rectory, vicarage or perpetual curacy, it shall be lawful for such Lord Lieutenant and Council, if they shall think fit, to erect the same into a separate benefice or parish, and to order and direct that such parish, tithes or portions of tithes or glebes so disunited, shall be transferred to the Ecclesiastical Commissioners for Ireland; and the right and interest in and to the same, and all arrears thereof, shall thereupon vest in the said Commissioners, and be by them carried to the general fund under their administration, after making thereout such provision, if needed, for the due performance of the occasional duties of such parish or place as the said Commissioners may think fit.

"And whereas the treasurership of the Cathedral Church of St. Mary's Limerick, in the diocese of Limerick, is now vacant, and it appears from the reports of the Commissioners on ecclesiastical patronage and revenue, that the corps of said treasurership consists of the rectory of St. Patrick's, having within it a perpetual curacy called St. Patrick's, *alias* Kilquane, and the rectory of Cahervalla and Emly Grenan, with cure of souls, the said several parishes or rectories constituting the union called the union of St. Patrick; that the revenues of said parishes or rectories respectively, under the Act of the first and second years of the reign of her present Majesty, cap. 109, intituled 'An Act to abolish composition for tithes in Ireland, and to substitute rent charges in lieu thereof,' are as follows, namely:—

"First. St. Patrick's Rectory, rent-charge	£256 3 0
"Second. Cahervalla Rectory, rent-charge	157 10 0
"Third. Emly Grenan Rectory, rent-charge	119 10 0
	<hr/>
	£526 3 0

"That there is a further income belonging to the said treasurership

"arising from demised lands amounting to the yearly sum of..... £80 6 1½

"Now, we the Lord Lieutenant and Privy Council, having maturely considered the circumstances of the said treasurership of St. Mary, Limerick, and the best mode for providing for the interest and convenience of the said several parishes and rectories forming the corps thereof, do hereby in pursuance of the power vested in us by the said hereinbefore first recited Act, order and direct that the said parish or rectory of St. Patrick's, together with the rectorial tithes thereunto belonging, be, and the same are hereby disappropriated, disunited and divested from and out of the said treasurership of St. Mary's Limerick, and united to the said perpetual curacy of St. Patrick's, *alias* Kilquane, erected as aforesaid within said parish or rectory of St. Patrick's. And we do hereby further order and direct, in pursuance of the said hereinbefore last recited Act of the third and fourth years of her present Majesty's reign, that the said parishes or rectories of Cahervalla and Emly Grenan, and the rectorial tithes thereunto belonging respectively, be, and the same are hereby disappropriated, disunited and divested from and out of the said treasurership of St. Mary's Limerick, and transferred to the Ecclesiastical Commissioners for Ireland.

"Given at the Council Chamber at Dublin, the 25th day of February, 1841; Charles Meath, Charles Kildare, Stephen Cashell, John Radcliff and A. R. Blake."

That the said yearly sum of £80. 6s. 1½d. sterling, in said order of the 25th day of February 1841 mentioned, was composed of the said yearly rent of £55. 7s. 8d. reserved by said lease, dated the 25th of July 1835, and of said yearly rent of £25 late currency, equivalent to £23. 1s. 6½d. present currency, and of said yearly rent of £2 late currency, equivalent to £1. 16s. 11d. present currency. That after the making of said order, and on the 20th day of March 1841, the Rev. Robert Knox was duly collated and installed into the said office and dignity of the treasurership aforesaid, and continued to act as such treasurer and to discharge the duties belonging to said office until the 16th day of October 1841, when the said Robert Knox was presented to the prebend of St. Munchins in said diocese, whereby the said office or dignity of the treasurership became void.

That on the 19th of October 1841, and after the promotion of the Rev. Robert Knox, notice of the vacancy of said treasurership was, in pursuance of the provision of the said Act of the 4 & 5 W. 4, c. 90, given to the Ecclesiastical Commissioners by the Bishop of Limerick, being the person having the patronage of the said dignity.

That on the 19th of March 1842, the Rev. James William Forster, the lessor of the plaintiff, was duly appointed treasurer, and had since

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acted as such, and performed all the acts and duties prescribed to validate his title to the said dignity pursuant to the statute.

The Jurors further found that on the 29th of September 1842, the sum of £55. 7s. 8½d., being one year's rent reserved by the lease of the 25th of July 1835, and which accrued due while the said James William Forster was such treasurer, became due and owing by the defendant; but whether or not the said rent became due to the said James W. Forster or to the Ecclesiastical Commissioners, the Jurors were ignorant, and prayed the advice of the Court, &c.

Mr. M. Barry, and Mr. Bennett, Q. C., with whom was Mr. James O'Brien, Q. C., for the defendants.

By the special verdict, the lands for which the ejectment was brought are found to be the glebe lands of Emly Grenan; and the question is, whether the Order of Council disappropriating the rectory, also disappropriated the glebe belonging to it? In considering this question, it will be necessary to refer to the legal meaning of the word "rectory," and to ascertain upon the authorities what is included in it.—[CHIEF BARON. Is not the question rather what is meant by the word "rectory" as used in the Order of Council, having regard to the recitals therein contained?]
Yes, but there is nothing to show that it is used in the Order in a sense different from its legal one.

Parsonage, church and rectory are frequently in the law treated as synonymous, and used promiscuously: *Godolphin's Rep.*, case 188. In the Year Book, 21 *Hen.* 7, 21, 11, *Bro. Abr.* tit. *Lease*, 20, cited in *Eagle and Young, T. C.* 50, it was held by two Justices that the church-yard and the tithes make the rectory, and that the whole will pass under the name of rectory by parol. In *Spelman*, 480, it is said, "*Rectoria pro integrâ ecclesiâ parochiali cum omnibus suis membris, &c., alias vulgo dictum beneficium.*"

In *Shepherd's Touchstone*, p. 94, the law is thus stated:—"By the grant of a rectory or parsonage, will pass the house and glebe, the tithe and offerings belonging to it;" *Ibid.*, p. 213. Glebe is a portion of land (meadow or pasture) belonging to or parcel of the parsonage or vicarage over and above the tithes: *Godolphin's Rep.*, 14 *Vin. Abr.* tit. *Glebe*, 409; *Ibid.*, tit. *Grant*.—[CHIEF BARON. On the face of this order, it would appear that the Privy Council were not aware that those glebe lands were attached to the rectory of Emly Grenan; they seem to have considered and treated them as an independent and separate property.]—In *Com. Dig. Ecclesiastical Persons*, C. 6, a rectory or parsonage is said to consist of glebe, tithes and oblation, established for the maintenance of a parson or a rector to have a cure of souls within the same parish: *Vin. Abr.* tit. *Grant*; *Ibid.*, tit. *Glebe*; from which it appears that to con-

stitute a rectory it is essential that there should be glebe land attached to it. Here it may be presumed to have been the object and intention of the Privy Council by their order to take the glebe land from the treasurer who lived at Limerick, and to transfer it to the rectory to provide a residence for the incumbent, and for the other purposes connected therewith.—[CHIEF BARON. The question is, was it the intention of the Council to strip the treasurer of his entire income, and to divest the dignity of all its emoluments?—They had the power not only to strip it of its emoluments, but to suspend the office altogether.—[LEFROY, B. They do not, however, by this order suspend the treasurership, but leave it to exist; and it being an office attended with the performance of certain duties, they would appear to have left it a small emolument.]

In construing this order, it becomes material to consider the Acts of Parliament passed by the Legislature in connection with this subject: 3 & 4 W. 4, c. 37, s. 124; 4 & 5 W. 4, c. 90, s. 5; 3 & 4 Vic. c. 101, ss. 5, 6.—[PENNEFATHER, B. We admit that the Privy Council had the power to do what the defendant contends they did; but the question is, have they done so by this order? The discussion of that question is quite independent of the Acts of Parliament.]—Having regard to the legal meaning of the word “rectory,” its force, and especially to the great number of cases in which it has been held to pass and comprehend the glebe and glebe land as one of its essential parts—the absence of express words in the order limiting its operation, and the policy and objects of the Legislature as expressed in the statutes,—the Court will arrive at the conclusion that the true construction of this instrument is, that the glebe lands of Emly Grenan vested together with the rectory, and as an integral part thereof, in the Ecclesiastical Commissioners, and that the lessor of the plaintiff is therefore not entitled to recover.

Mr. Henn, Q. C., and Mr. Rogers, contra, were not called on by the Court.

BRADY, C. B.

The question is, what have the Privy Council done by this order? That is to be determined by taking the whole of the instrument together, and seeing in what sense they have used the words—[His Lordship here read the order.]—It thus appears that the Council have used expressions showing that in their contemplation the demised lands form no part of the property with which they were dealing;—they might have been the property of the treasurer in some other right. They have taken the distinction, and they transfer the tithes to the Ecclesiastical Commissioners; and they are silent altogether as to the rents of the demised lands. In short, it is the same as if they had said, “with respect to the

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rents of the demised lands we make no order ;” and yet the argument is, that by this order, under the word “rectory,” the demised lands must have passed.

It is not necessary for us to consider what the intention of the Council may have been ; but as well as we can judge from the language they have used, they have made no order as to the rents arising from the demised lands, which must therefore be left with the treasurer ; consequently, there must be judgment for the lessor of the plaintiff.

Judgment for the plaintiff.

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TUTHILL v. UNTHANK.

(*Common Pleas.*)

Nov. 5.

In this case, the plaintiff had revived a judgment recovered by him against the defendant in the year 1830, and had issued a *fi. fa.*, under which the goods of the defendant had been taken in execution. The defendant had obtained a conditional order in last Hilary Term to set aside the said judgment of revivor, and the writ of *fi. fa.*, on the ground of the irregularity of non-service of the *scire facias*; and because that the full demand of the plaintiff on foot of said judgment had been paid in 1837. On the occasion of this motion, the defendant made an affidavit denying the service of the *scire facias*; also stating that one George Wheeler, since deceased, had been security with her in a joint and several bond and warrant for the amount of the judgment; and that separate judgments had been entered up against her and the said George Wheeler. She alleged also, that the plaintiff had, in 1837, revived the judgment against Wheeler, and had issued execution thereon, and had levied the full amount of the judgment; and that Wheeler had claimed credit for the same against the defendant in an equity suit; and that no interest had, since that time, been demanded or paid by the defendant to the plaintiff on foot of said judgment. On the motion to make the conditional order absolute, the Court ordered on consent that the motion should stand over until this Term, and that the plaintiff should forthwith file a *scire facias* on foot of the judgment, to which the defendant should file a plea of payment; and that a trial should be had on the issue to be joined on said *scire facias* before a Jury of the county of the city of Limerick, at the last Summer Assizes—the questions to be tried being, first, whether the judgment in this cause, and that against Wheeler, were entered upon one and the same bond, and to secure one and the same debt; and secondly, whether the said judgment against Wheeler had been paid or satisfied before the issuing of the aforesaid *scire facias*; and that the execution should be withdrawn, and security given by the defendant for the amount thereof; *the defendant thereby undertaking to bring no action whatever.* Notwithstanding this order, the plaintiff had not issued any *scire facias*, nor taken any other step in the matter; and the defendant now moved the Court, that the said conditional order should be made absolute; and that the defendant should be released from the undertaking not to bring an action against the plaintiff, as in the foregoing order mentioned; and that the said order should be to that extent varied.

Where a judgment of revivor, and execution thereon, had been set aside, on allegations of non-service and of payment, on the terms of the plaintiff issuing another *scire facias*, and trying an issue on a plea of payment at the next Assizes, the defendant undertaking not to bring any action whatever; the plaintiff having omitted to issue said *scire facias*, the Court confirmed the setting aside of the *scire facias* and the execution, and struck out the undertaking on the part of the defendant not to bring an action.

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Mr. Fitzgibbon, Q. C., and Mr. Kane for the defendant.—The plaintiff having failed in performing his part of the order of the Court, the case is now in the same position that it was before that order was pronounced; and as it is obvious from the affidavits, and the defendant's default in not bringing the issues directed before the Jury, that his conduct in issuing the *scire facias* which has been set aside was malicious and contrary to good faith, as distinguished from a mere oversight or practical irregularity, the Court will not impose on us an undertaking not to bring an action for the injury inflicted by the plaintiff: *Abbott v. Greenwood* (a); *Lorimer v. Lule* (b); *Cash v. Wills* (c); *Ferg. Prac.* 1040.

Mr. O'Brien, Q. C., and Mr. J. D. Fitzgerald, contra.—The undertaking not to bring an action was not a conditional or temporary undertaking, or it would have been so expressed in the order; and if the issue had been decided against us, the Court would have done no more than set aside the *scire facias* and the execution, as prayed by the conditional order; and the plaintiff is not in a worse position by not trying the issue. The undertaking was voluntary on the part of the defendant, and cannot now be withdrawn: *Mole v. Smith* (d).

DOHERTY, C. J.

In announcing the decision of the Court, it is not my intention to go into the circumstances of the case; acting on the principle which has always guided us, that where there is a probability of the facts being submitted to the decision of a Jury, it is better to abstain from all observations and comments which might, perhaps, tend to influence them one way or the other. The case, as it originally came before the Court, was on a motion to set aside a judgment obtained on a *scire facias*, and execution issued thereon by the plaintiff against the defendant; and the allegation of the defendant was, that whereas the full amount of the original judgment had been levied off the goods of her surety by the plaintiff, and had been satisfied, the plaintiff had no right in point of law or of justice to issue another *scire facias* against the defendant, and seize her goods under a *fi. fa.* On the discussion of this motion, it appeared to us, that the substantial questions to be tried between the parties were, whether there had been one judgment or two judgments entered for the same debts; and whether one of the judgments had been paid or satisfied, and to the knowledge of the plaintiff? In this view the parties acquiesced; and, in consequence, the plaintiff undertook to issue a *scire facias*, the defendant pleading payment thereto; and we narrowed the

(a) 7 Dow. P. C. 534.

(c) 1 B. & Ad. 375.

(b) 1 Chit. 134.

(d) Jac. & W. 670.

issue to be tried to the aforesaid substantial questions which went to the merits of the case, viz., was the judgment against the defendant, and the judgment against Wheeler, for one, or for two different and distinct debts? and if for one only, was that against Wheeler paid or satisfied? The motion was ordered to stand over until after the trial; and part of the terms was, that the defendant should undertake to bring no action. Since then, the Assizes have passed, and the plaintiff has not proceeded to try the issues, nor has he suggested or substantiated any reason for his default. He has not stated that there was any fatality to prevent him performing the condition on which the defendant undertook not to bring any action; for, though that undertaking is not in terms conditional, yet it is impossible not to see that its meaning was, "provided the plaintiff go to trial as enjoined by this order, I will undertake to bring no action against her in the mean time." It is now confessed that he did not take any step towards going to trial; and therefore, he has failed in establishing that the two judgments—that against the defendant, and that against Wheeler—were for different and distinct debts. Under these circumstances, is it right or just that the Court should interfere and restrain the defendant from bringing her action against the plaintiff for the injury which she alleges herself to have sustained? We think not; and therefore, without expressing any opinion whatever on the merits of the case, the Court is of opinion, that in setting aside the *scire facias* and execution, they are not called on to impose any terms upon the defendant.

Confirm the order, setting aside the judgment of revivor and the execution which issued thereon, with costs; and strike out the undertaking thereon, on the part of the defendant, not to bring any action.

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COLEMAN v. LYNCH.

Nov. 11.

A party had been declared a bankrupt, and the assignee appointed on the 2nd September 1842. In April 1843 the usual consent to enable him to obtain his certificate had been signed by the assignee and the majority in number and value of the creditors; but the other necessary steps to obtain the certificate had not been taken, and the bankrupt had continued to trade in his own name, without any attempt on the part of the assignee to take possession of his goods until August 1844, when they were seized and sold by the Sheriff under a writ of *fi. fa.*, at the suit of a judgment creditor. The sum levied having been lodged in Court by the Sheriff, the Court refused to pay it over to the assignee.

In this case the Sheriff had levied on a writ of *fi. fa.*, marked and delivered to him in August 1844, a sum of £93 off the goods of the defendant, but had been served with a cautionary notice on behalf of a third party, stating himself to be the assignee of the defendant, who, it appeared, had been declared a bankrupt under a commission issued on the 13th of August 1842. The assignee had been appointed on the 15th of September in the same year; and it was sworn by him that the certificate had never been allowed by the Commissioner, though it had been signed by several of the creditors; and that he had duly acted, and was still acting, as such assignee. It further appeared, that the assignee had caused notice to be served on the Sheriff on the day of the sale, requiring him to pay over to him the proceeds of the sale. Under these circumstances, the Sheriff came for liberty to lodge the amount levied in Court, which motion was granted, with costs, subject also to his demand for poundage in the event of the plaintiff's succeeding in having the money paid over to him; and the assignee then served a cross notice on the plaintiff, that he would move that the sum so levied and lodged in Court should be paid over to him. To meet this motion the plaintiff filed an affidavit, admitting the bankruptcy and the appointment of the assignee, and stating that after the bankruptcy the defendant had recommenced business under the name of his nephew, until the 7th of April 1843, when he resumed it in his own name, which was re-painted over his shop and stores; that, on that day, the usual consent from his creditors to a bankrupt, to enable him to procure his certificate (and which was set out in the affidavit) had been signed by the assignee; and that shortly after, the great majority in number and value of the creditors (and sufficient, according to the provisions of the Acts, to entitle the bankrupt to his certificate) signed the consent; and that it was generally believed that the bankrupt had duly obtained his certificate, though it had been lately ascertained that the other necessary steps to obtain the certificate from the Commissioner had not been taken. It also stated, that though the defendant had continued to trade down to the time of the seizure, no attempt had been made by the assignee to take possession of his goods, though he lived in the same town.

Mr. Hatchell, Q. C., for the assignee.—This is the common case of an uncertificated bankrupt, without any suggestion that any part of his

debts had been paid. It is a question of law, whether the bankrupt had obtained his certificate or not, and must be decided according to strict law, which may as well be decided now as after an action brought to try the right to the money levied and lodged in Court. The consent of the creditors does not amount to a certificate, because a certificate is of no force until allowed by the Chancellor. This does not come within the principle of those cases in which there is no interference on the part of the assignee; and there is no instance in which an assignee has claimed the property of the bankrupt, and has not succeeded in obtaining it.

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Mr. James Plunkett.—This is a motion to the discretion of the Court; and if so, the case of *Troughton v. Gitley (a)* is an authority in our favour, where it was decided, that when a man was permitted to trade for four years without interruption or claim, the creditor subsequent to the bankruptcy was preferred. In that case, Lord Camden observed, “It is admitted that an agreement in writing by all his creditors to discharge him, would have been sufficient, and equal to a “certificate.” This case, and principle, is recognised by Lord Loughborough in *Ex parte Brown (b)*. It is also recognised in *Ex parte Butler (c)*, where the very principle contended for here, was admitted by the Counsel for the assignee under a second commission, viz.—that if the assignee, with a full knowledge of the property being in the possession of the bankrupt, permit him to trade with it, and to gain a false credit with persons dealing with him, the Court ought not to interfere. Moreover, the certificate was valid without allowance by the Chancellor: *Callen v. Meyrick (d)*; *Ex parte Jungmichel (e)*.

Mr. Hatchell, Q.C., in reply, cited *Kitchen v. Bartsh (f)*, to show that a third party cannot claim after-acquired property against an assignee of an uncertificated bankrupt; and that the property absolutely vested in the assignee on being acquired.

The COURT refused the motion on the part of the assignee—the plaintiff undertaking to appear to a writ served on him by the assignee for money had and received, and also to admit the receipt of the money.

(a) Amb. 630.

(c) 2 M. D. & D. 731, 740.

(e) 2 M. D. & D. 471.

(b) 2 Ves. jun. 67.

(d) 1 T. R. 361.

(f) 7 East, 53.

M. T. 1844.
Common Pleas.

Nov. 14.

Where a plaintiff, in showing cause against a conditional order to enter up judgment as in case of a nonsuit, avers his belief that the defendant is in insolvent circumstances, and states facts from which such insolvency might be inferred, the defendant must, in addition to a denial or explanation of such facts, aver directly that he is solvent.

MR. ROBINSON, on the part of the plaintiff, showed cause against a conditional order obtained by the defendant to enter up judgment as in case of a nonsuit, the cause having been at issue three Terms. The affidavit on which the plaintiff relied, stated his belief, and certain circumstances from which it might be inferred, that the defendant was in insolvent circumstances, and would be unable to pay the amount of the verdict and the costs, if recovered against him.

Mr. *P. Blake*, contra, relied on an affidavit in which the defendant denied, or explained, the several facts stated in the plaintiff's affidavit, from which it might be inferred that he was in solvent circumstances; but he did not swear positively that he was so, or that he would be able to pay the plaintiff the amount of a verdict and the costs, if recovered. He also swore, that he was advised that he had a good and valid defence to the action.

DOHERTY, C. J.

The plaintiff has averred his belief that the defendant is in insolvent circumstances; and the defendant has not directly averred that he is solvent, and able to pay the amount of a verdict recovered against him, although he has denied, or explained, the facts from which the plaintiff had inferred his insolvency. We must, therefore, conclude that he is in a state of insolvency, and that further proceedings on the part of the plaintiff would, if successful, be fruitless, which has always been held to be good cause against entering up a judgment as in case of a nonsuit.

Allow the cause shown.

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Common Pleas.

BLAKE v. BLAKE.

Nov. 25.

THE plaintiff in this suit having changed his attorney, a consent was signed by him, and afterwards made a rule of Court, that it should be referred to the Taxing Officer to tax and ascertain the costs of the former attorney, Mr. Bourke; but this consent did not contain any undertaking to pay the amount of said costs, when ascertained. The costs having been duly taxed and certified, and a demand made of the amount, which was not attended to, Mr. Bourke served a notice of motion for an attachment against the said plaintiff for having declined to pay the said costs, or for an order of the Court on the said plaintiff to pay them within a specified time, or that the present attorney should be restrained from proceeding in the cause. The case had been submitted to arbitration by an order of *Nisi Prius*.

Mr. *Isidore Blake* moved the foregoing motion.—We are entitled to have an order for the attachment, although there was no direct undertaking to pay, as the party is in contempt, the Court having made an order to change the attorney, which implies it as a condition precedent to the exercise of jurisdiction. At all events we are now entitled to an order for payment, and that the proceedings should be stayed in the mean time; and on this order we can get an execution under the 3 & 4 Vic. c. 105, s. 27: *Neale v. Postlethwaits (a)*.

DOHERTY, C. J.

As to both applications, my Brethren are of opinion that we should say No rule. With respect to the second, they are of opinion that the Court have no authority to suspend, until payment, not the action itself, but what must be considered another proceeding altogether, viz., an arbitration made by a rule of *Nisi Prius*. As to my own opinions on the subject, although I confess myself to entertain some doubts in the absence of direct authority, yet, if I had been fortified by the opinions of my Brethren, I should have felt inclined, on principle, to grant the motion on both points.

No rule.*

The plaintiff on changing his attorney, signed a consent, which was made a rule of Court, that it should be referred to the taxing officer to tax and ascertain the amount of the costs of the former attorney; but the usual undertaking to pay was omitted. The costs having been taxed, certified and demanded, the Court refused to grant an attachment against the plaintiff for non-payment; and the cause having been referred to arbitration by a rule of *Nisi Prius*, the Court refused to make an order for payment within a specified time, or that the proceedings should be stayed.

(a) 1 Ad. & E. N. S. 75; S. C. 6 Jur. 1134.

* Vide *Handy v. Collett*, 7 Dow. P. C. 599; S. C. 2 W. W. & H. 63.

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1845.
Hilary Term.
Jan. 14.

Executors of MILLS v. HORNER.

Where a beneficed clergyman had been discharged as an insolvent debtor, the Court held that a judgment creditor, whose debt had been returned in the schedule, might legally issue a *fi. fa.* for the purpose of obtaining a return of *nulla bona*, and thereupon issue a *levari de bonis ecclesiasticis*.

THE defendant had, on the 6th of July 1844, been discharged as an insolvent debtor, having been at the time the rector of Drumglass in the diocese of Armagh; and the plaintiffs had been inserted in his schedule, and duly noticed, for the amount of the judgment in this case. The plaintiffs having been desirous of obtaining a sequestration against the said living of Drumglass, to come in after some other sequestrations then in actual force, on the 30th of last August issued a writ of *fi. fa.* out of this Court, in the usual form, directed to the Sheriff of Tyrone, tested the 12th of June, and returnable on the 2nd of November, marked for the amount due on foot of the judgment; and on the back of this writ was indorsed a notice to the Sheriff stating the residence of the defendant, that he was a beneficed clergyman in the Primate's diocese, that he had taken the benefit of the Insolvent Act, and had no goods seizable by the Sheriff; and to make the usual return, to enable the plaintiffs to issue a writ to the Primate to ground a sequestration against the defendant's living. The defendant having been removed from the living of Drumglass to that of Killeshill during the Vacation, and while the writ was in the Sheriff's hands, the Sheriff on the 2nd of November returned *nulla bona*, and that the defendant was a beneficed clergyman and rector of Killeshill in the county of Tyrone, and diocese of the Primate. On this the plaintiffs issued the writ of *levari de bonis ecclesiasticis*, directed to the Primate, tested the 2nd of November, and returnable on the 18th of November instant; and the same was duly handed to the Primate through his registrar, and had been laid on. It appeared that the said sequestration was the first delivered against the living of Killeshill.

Mr. Shiel, Q. C., now moved the Court, that the said writ of *fi. fa.*, together with the writ of *levari de bonis ecclesiasticis*, and the subsequent proceedings had thereon, should be set aside, having been issued illegally. By the provisions of the Insolvent Act, 3 & 4 Vic. c. 107,* the person

* 3 & 4 Vic. c. 107.—“And he it enacted, that nothing in this Act contained shall extend to entitle the assignee of the estate and effects of such prisoner, being a beneficed clergyman, or curate, to the income of such benefice or curacy, for the purposes of this Act: provided always, that it shall be lawful for such assignee to apply for and obtain a sequestration of the profits of any such benefice for the payment of

and goods of the defendant were discharged from this debt; and the 71st section, on which the plaintiff will rely, only applies to property on which the judgment attached at, or previous to, the time of the insolvent's discharge; and therefore, this after-acquired benefice is not now attachable. On the other hand, the 78th, when read in connection with the 43rd section of the Act, enables the assignee to apply to the Court for the after-acquired property of the insolvent, for the benefit of his creditors, including the plaintiffs; which course is consistent with the policy of the Act, and obviates the injustice that would otherwise arise, from permitting one creditor to sweep away the entire fund, even to the prejudice of prior creditors; because if a *puisne* creditor gets into possession by sequestration, he remains in possession until his debt is fully satisfied: *Sterling v. Wynne (a)*. Again, the 82nd section forbids the issuing of

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(a) 1 Jones, 63.

"the debts of such prisoner; and the order appointing the assignee shall be a sufficient warrant for the granting of such sequestration, *without any writ or other proceedings to authorise the same*; and such sequestration shall accordingly be issued, as the same might have been issued upon any writ of *levari facias*, founded upon any judgment against such prisoner." Section 43.

"Provided, &c., that nothing in this Act contained shall extend, or be construed to prevent any mortgage, charge, or lien, upon any estate of such prisoner, or any part thereof, made prior to the making of such vesting order as aforesaid, from taking place upon the lands, tenements, or hereditaments, or personal estate and effects comprised in, or so charged, or affected by such mortgage, charge, or lien respectively; nor to prevent any statute staple, statute merchant, recognizance or judgment, acknowledged by or obtained against such prisoner, prior to the making of such vesting order as aforesaid, from taking place on the lands, tenements, or real estates of such prisoner, unless in any of the said cases, the creditor and creditors having such mortgage, charge, lien, &c., shall elect to receive any dividend under this Act in respect of such debt," &c. Section 71.

By the 78th section it is enacted, that before adjudication the prisoner shall execute a warrant of attorney to confess judgment for the debts in his schedule; "and if at any time it shall appear to the satisfaction of the Court that the prisoner is of ability to pay such debts or any part thereof, or that he is dead, leaving assets for that purpose, the said Court may permit execution or other proceeding to be taken out upon such judgment for such sum of money, as under all the circumstances of the case the said Court shall order; such sum to be distributed rateably amongst the creditors of such prisoner," &c. Section 78.

"And be it enacted, that after any person shall have become entitled to the benefit of this Act by any such adjudication as aforesaid, no writ of *capias ad satisfaciendum*, *feri facias*, or other writ of execution against the body, goods, or chattels of such prisoner, shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled; nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this Act, and by special order of the Court obtained for that purpose as hereinbefore mentioned." Section 82.

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a *fi. fa.* for any debt scheduled, as this is, prior to the discharge; and yet the plaintiff has, in this instance, issued that writ, which being plainly illegal, must be set aside: *Regina v. Jones (a)*: and if it falls, the sequestration, which is grounded on it, must fall likewise. Moreover, the judgment of Chief Baron Joy, in the case of *Sterling v. Wynne*, shows that a judgment is no charge on a benefice; and the defendant being discharged from all debts, except those which are a lien on real property, the plaintiff has been irregular in issuing execution against this benefice.

Mr. Butt, Q. C., and Mr. Lawson, contra.—Though the 82nd section of the Insolvent Act prohibits the issuing of a *fi. fa.*, yet it has been the invariable practice of the Court to issue it as a mere matter of form, for the purpose of issuing a sequestration on the return of *nulla bona*. It is, in fact, only accessorial to the latter writ; and the Officer would not issue it, under the circumstances of this case, unless he was informed that there was no intention to levy under it, but merely to make use of it as a step to procure a sequestration, and which the indorsement shows. In the same manner an *elegit* is an execution against the goods of the debtor (*bona et catalla et medietatem terrarum*); and the argument which would deprive the plaintiff in this case of the power of issuing a *fi. fa.*, would abolish the every-day practice of judgment creditors of insolvents applying for receivers over their real estates; for they must show by affidavit that they are entitled to sue out *elegits*. It is, therefore, impossible to give a literal construction to the 83rd section, as contended for on the other side. At all events, it is the practice of the Court to issue those writs, and the practice of the Court is the law of the Court, as observed by Chief Justice Bushe in the case of *Sterne v. Guthrie (b)*; more especially, when it does not contravene the provisions of the Insolvent Act, but gives it a sound construction. The case of *Bishop v. Hatch (c)* has decided that a sequestration is not an execution within the terms of this 71st section. As to the proposition that judgments are not charges or liens on ecclesiastical benefices, they have been made so by the express provisions of the 3 & 4 Vic. c. 105, s. 22, which has come into operation long since any case ruling the contrary has been decided. As to the argument founded on the statement that this benefice is after-acquired property, and, as such, is to be made available through the assignee under the 78th section, the same argument would apply to real estate acquired by the insolvent, after his discharge; which would not, therefore, be liable to his judgment debts, except rateably with other creditors, through the hands of the assignee. As to the argument that the 71st section only applies to cases in which the judgment is actually a charge on real estate, it may

(a) M. 9 & W. 104.

(b) 1 F. & S. 49.

(c) 1 Ad. El. 171.

be replied, that before the passing of the 3 & 4 Vic. c. 105, a judgment was not a specific lien upon real estate, but was only made so by the issuing of an *elegit*; yet it was always held that the judgment creditor might proceed against the real estate of the insolvent: *Rawson v. Hinds* (a).

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Mr. J. D. Fitzgerald, in reply.—Only for the indorsement on this writ of *fi. fa.*, there would be no case on the part of the plaintiff; and notwithstanding that indorsement, the Primate would be bound to levy the amount off the ecclesiastical goods of the defendant, such as a salary (if any) attached to the rectory, crops on the glebe, or arrears of tithe and rent, and the other ecclesiastical goods mentioned in *Moseley v. Warburton* (b), and none of which came under the denomination of real estate. The writ is therefore clearly illegal. The case of *Bishop v. Hatch* merely decides that a sequestration laid on after the assignment to the provisional assignee, but before the adjudication, will not be set aside. As to the argument that a receiver could not be obtained on petition over the estate of an insolvent, because the writ of *elegit* contains a *fi. fa.* against the goods of the debtor, it is not necessary to show in the petition any thing but that the judgment has been revived within a year; and the Court will award the execution to which the creditor is entitled: *Rawson v. Hinds*.

DOHERTY, C. J.

This was an application on the part of the defendant, that the writ of *fi. facias*, together with the writ of *levari*, or *fi. facias de bonis ecclesiasticis* issued in this case, and all the subsequent proceedings of any kind had thereon, should be set aside, the said writs having respectively been illegally and irregularly issued; inasmuch as the said defendant had been previously duly discharged by the Court for the Relief of Insolvent Debtors, from the debt for which such writs issued. Such were the terms of the application to the Court. Now, we have most anxiously and attentively looked into the statute passed for the relief of insolvent debtors in this country; and we find that the question turns altogether on the construction which ought to be given to the 71st section of that statute. We have also inquired into the practice of the Court as to the issuing of the writs of *fi. facias* in cases similar to that before the Court; and the result of that inquiry shows that they are to be regarded as almost a mere matter of form. And therefore, as we are of opinion that the issuing of those writs was not contrary to law, within the provisions of the 71st section of the Insolvent Act, nor contrary to the practice of the Court, but according to law, and the practice of the Court, the motion must be

(a) 1 H. & B. 599.

(b) 1 Salk. 320.

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refused. We say nothing on the subject of costs, as the question was one fit for the Court to determine on the construction of a new statute, and was fairly brought before them and discussed for the first time.

Refuse the motion without costs.

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Jan. 16.

After plea pleaded, the defendant will be allowed to have a bill of costs, the subject of the action, referred for taxation, without an undertaking to pay the amount when ascertained; and without prejudice to his right to dispute the retainer.

THIS was an action brought for the recovery of the amount of a bill of costs; and the plaintiff having refused to sign a consent to have the costs taxed, without the usual undertaking on the part of the defendant to pay the amount when ascertained, the defendant served a notice of motion, that the said bill of costs should be referred for taxation, without prejudice to the defendant's right to make any defence which she might be advised to make at the trial; and without any undertaking on her part to pay the said costs; and that the proceedings in the cause might be stayed in the mean time. The defendant had pleaded the general issue, the statute of limitations, and coverture.

Mr. *O'Hagan* moved the foregoing motion.—The object of the motion is to have the true amount of the bill of costs ascertained, without prejudice to the defendant disputing the retainer at the trial, as the propriety or amount of the charges cannot then be canvassed: *Watson v. Postan* (a); *Williams v. Griffith* (b); *Ferg. Prac.* 779. The Court have an inherent jurisdiction to order a bill of costs to be taxed after action brought, independent of the statute: *Wilson v. Gutteridge* (c); *Anon.* (d).

Mr. *Hamilton Smythe*, and Mr. *J. D. Fitzgerald*, denied that the Court had power to grant the motion; and even if they had, they would not exercise it after the delay in making the application until after plea pleaded; and then praying a stay of the proceedings, by which a trial would perhaps be lost.

DOHERTY, C. J.

It is but reasonable that the defendant should have an opportunity of

(a) 2 C. & J. 270.

(b) 6 M. & W. 32.

(c) 4 D. & K. 736.

(d) 2 Chit. 155.

reducing the costs to their proper amount, which cannot properly be done at the trial. He is therefore entitled to the substance of his motion. In order, however, that no injury may in this instance be done to the plaintiff, we shall, with his consent, by the rule we shall make, give the defendant the advantage he seeks by this motion, with a saving of what may prove to be needless expense.*

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No rule on the motion,—the plaintiff undertaking, in the event of his obtaining a verdict, to go before the officer to tax his costs, and to reduce the verdict to the amount allowed to her on taxation; and no costs of this motion.

* Vide *Dagby v. Kentish*, 1 Dow. P. C. 331; *Doe d. Palmer v. Roe*, 4 Dow. P. C. 95; *Weymouth v. Knipe*, 5 Dow. P. C. 495; *Ex parte Bowles*, 1 Bing. N. C. 632.

In re GEORGE KENNEDY.

Jan. 20.

THIS was a petition moved by George Kennedy, the late crier of the Court, who had been dismissed from his office by the Chief Justice; alleging that he had been illegally and improperly so dismissed by his Lordship, and praying an order of the Court for the payment of his last quarter's salary, and to be restored to the emoluments, and exercise of the duties of the said office.

TORRENS, J.

This case comes before the Court on the complaint of George Kennedy, the late crier; and in conjunction with my Brethren Ball and Jackson, the case has been taken into our anxious consideration, my Lord Chief Justice having declined to interfere in the matter: in consequence of which, and by reason of my Brethren and myself having come to the same conclusion, it is my duty to pronounce the rule of the Court.

The matter on which we are to pronounce our decision, was brought before us on the complaint of an individual, who, by the construction of the statutes which regulate the proceedings of the Law Courts in this country, we all consider to be an officer of the Court; and upon that

The Court have no jurisdiction to pronounce any rule on an application made by a party who had held, and had been dismissed from the office of crier of the Court by the Chief Justice, to be restored to the emoluments and duties of said office, alleging that he had been illegally and improperly dismissed therefrom.

The Court does not possess a jurisdiction to entertain such an application in the case of any

officer. *Dissentiente* TORRENS, J.

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point there is no difference of opinion between my learned Brethren and myself; but as we have, on other parts of the case, arrived at the same conclusion by different processes of reasoning, I hope I may be excused in occupying a larger portion of the public time than I should otherwise have thought it necessary to do, in assigning the reasons on which my opinion is formed, and the grounds on which it rests. In examining the statutes by which the proceedings of the Law Courts in this country are regulated, more particularly the 1 & 2 G. 4, c. 53, and the 7 & 8 Vic. c. 107, we have come to the conclusion, that under the construction of these statutes, the crier of the Court is to be considered as one of its officers. In the schedule to the Act of the 1 & 2 G. 4, c. 53, the crier is recognised, *eo nomine*, as one of the officers of the Court, and a salary allocated for his remuneration as such officer; and in the late statute of the 7 & 8 Vic. c. 107, which has repealed the statute of the 1 & 2 G. 4, and all appointments made under it, there is an express saving in these words, of several officers mentioned in the exception, namely, the taxing officer, the offices of crier, tipstaff, and serjeant-at-arms, in the several Courts, "which shall remain as heretofore," words upon which I shall hereafter have occasion to comment more at large. In our judgment, therefore, the crier of this Court is to be deemed an officer of it, and is to be dealt with as such; and as such officer, the Court has jurisdiction and authority to inquire into any misconduct committed by him in the execution of his duty, and to award punishment if necessary.

It is to be observed, that at the common law the crier was not considered to be an officer of the Court. In the 4th *Institute*, page 100 of the octavo edition, in which the jurisdiction, authority, and constitution of the Court of Common Pleas is discussed and treated of by Lord Coke, the several officers constituting the establishment of the Court of Common Pleas are by name specifically mentioned, such as the prothonotary, filacer, register, &c.; but in this enumeration the office of crier is not mentioned, and therefore, I think it may be fairly inferred, that such office was not, at the period at which Lord Coke wrote, nor at any time, in his opinion, one of the constituent officers of the Court at common law. Several cases are referred to by Lord Coke, extracted from the records of the Court, in which the Court proceeded to inquire into the misconduct of the enumerated officers; and their guilt being established by different processes of inquiry, heavy punishments appear to have been awarded by the Court; and it is on this that I ground my opinion, that if the crier of this Court, having been created an officer of the Court by statute, the common law jurisdiction of this Court attaches upon him, and makes him responsible to the Court for any misconduct in his office. Now, if the complainant here, the late crier, was law officer of the Court to all intents and purposes, as the other officers of the Court are, I, for one (speaking my own opinion), should hold that it was within the

province and power of the Court to inquire into his conduct in the execution of his duties ; and the same power would, I am likewise of opinion, extend to his protection, if he were unjustly interfered with, no matter by whom, in the performance of his duties. I do not mean, however, by this observation, to convey it as my opinion, nor should I wish to be understood (for the contrary is decided by very high authority), that it is any part of our duty to inquire into the *right* of appointment to the office ; but merely this, that finding an officer of the Court, *de facto* in the actual execution of the duties of his office, he is within our jurisdiction, and we are to see that he is not improperly disturbed in the exercise of those duties, so that either he or the public should suffer any detriment by such disturbance. I make these observations, and I should wish so to be understood, as altogether irrespective of the *appointment* or *dismissal* of the officer, and mean to apply them to the case of the officer *de facto* disturbed or interrupted in the execution of those duties, which, as an officer of the Court, he is bound to perform.

Let me now consider whether the party here complaining is within this state of protection, so far as it applies to the question of his dismissal by the Lord Chief Justice, the duties of the office being performed by a successor appointed by the Chief Justice, and no complaint as to his efficiency. This power of dismissal by the Lord Chief Justice of this Court mainly depends on the construction to be put on the word "*heretofore*," occurring in the section of the 7 & 8 Vic. c. 107 ; namely, that the taxing officer, *the crier*, the tipstaff, and sergeant-at-arms, "shall remain as *heretofore*:" and therefore, the circumstance of the crier having become, by these enactments, a recognised officer of the Court, to be appointed, and to hold his office as heretofore, naturally suggests and leads to the consideration of what is, and has been, the tenure of the office ; and after diligent inquiry on that subject, I have come to the conclusion, that it is the right of the Chief Judges of the several Common Law Courts in this kingdom, to appoint or dismiss the crier of their respective Courts at pleasure. This conclusion is sustained by the undisturbed usage, as far as living memory extends, and the records of the successive appointments reach : and therefore, finding this officer so appointed, and dismissed, at the will of the Chief Justice, the officer does not come under the description of an officer of the Court at Common Law, but removable by the Chief Justice, and is not entitled to the same privileges, and does not bring himself under the corresponding protection of the Court. Now, in reviewing what is established by immemorial usage, supported by the memory of living witnesses, by records, and the reports of authorised Commissioners, as to this office of crier, I shall commence with what relates to that officer in the Court of Common Pleas.

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On the appointment of Lord Carleton, in the year 1782, to be the Chief Justice of this Court, on the death of Chief Justice Patterson, the crier, who had been appointed by, and acted under, his predecessor, was dismissed by Lord Carleton, and a Mr. Johnston appointed by him; he entered on, and performed the duties of the office during the period of Lord Carleton's presiding in this Court, and until his resignation in the year 1800. This fact depends not on any record or written memorial, but on the recollection of a living officer of this Court, the late Clerk of the Rules, Mr. Jackson, who well remembers the transaction, and the circumstances of the dismissal of C. J. Patterson's crier, and appointment of Mr. Johnston; and Mr. Jackson himself being at the same time appointed Registrar of Lord Carleton, he well remembers the circumstances of the several appointments made by his Lordship. This Mr. Johnston, so appointed by Lord Carleton to be crier, continued to act in that capacity until the accession of Lord Norbury to be the Chief Justice, when a person of the name of Timothy Daly was by him appointed to the office, without any objection having been made, though it appears that Mr. Johnston was not removed, but continued to act as deputy for Daly. This fact also is well recollected by Mr. Jackson, who also acted as the Registrar of Lord Norbury, and was intimately acquainted with all the arrangements which his Lordship made, and particularly with Timothy Daly, who had been one of his own clerks. Therefore, we have in this Court, the dismissal of the crier appointed by Chief Justice Patterson, the appointment of another person to the office by Lord Carleton, and the appointment of another and different person by Lord Norbury on his accession, who continued acting by himself, or deputy, until the coming in of the present Chief Justice Doherty (never having been removed by Lord Plunket, who preceded him); when, upon Chief Justice Doherty's appointment, he continued Mr. Johnston in the office, having a due regard to his long services, and the fidelity with which he discharged his duties; and Mr. Johnston remained as crier until his death, when Chief Justice Doherty appointed a person of the name of Moore, who remained in office until his death; and upon that event, the late crier, George Kennedy, was appointed by the present Chief Justice. Such is the short history of the Common Pleas in respect of this office, extending over a period of upwards of sixty years. I shall now proceed to inquire into the practice of the other Law Courts in respect of the same office, beginning with that of the Queen's Bench.

I have not been able to obtain any satisfactory information as to the person who filled the office of crier in the Court of King's Bench at the time of the appointment of Lord Clonmel to be Chief Justice; but I find that during the period in which he presided in that Court, and up to

the time of his death, a person of the name of M'Donnell held the office of crier ; and I find that upon the death of Lord Clonmel this same person was re-appointed by Lord Kilwarden in the year 1798. This fact appears in the Report of the Commissioners who were appointed to examine into the practice of the different offices of the Common Law Courts previous to the year 1821 ; and appears on the testimony of M'Donnell himself, who admitted that he had been appointed by Lord Clonmel, and re-appointed by Lord Kilwarden. This M'Donnell continued in the execution of the duties of the office until he was disabled by illness from performing them, and a person of the name of Triston was then appointed by Chief Justice Downes, in the lifetime of M'Donnell ; and that successor continues in the same situation to the present day, performing the duty either in person or by deputy—neither the late Lord Chief Justice Bushe, or the present Lord Chief Justice having exercised their rights in removing him, but continuing him in office as Lord Chief Justice Doherty did the crier of this Court. It will be seen by these facts, that the undisputed practice of the Queen's Bench has been for the Chief Justice to appoint, or re-appoint, or dismiss the crier. The cases I have alluded to extended over a period of fifty years, and perhaps longer.

I now come to the Court of Exchequer. In that Court (Exchequer), a series of appointments to which I shall now advert will strongly support the opinion I have formed ; for there is an abundance of precedents to establish beyond all doubt, in that Court, the power of the Chief Judge, not only to appoint, but to dismiss the crier of the Court on his coming into office ; a course which is equally applicable to the Queen's Bench and Common Pleas, although it has been less frequently adopted, owing to the general inferiority of the situation in these Courts. To show this, I shall, as I have already done in referring to the practice of the other Courts, go back to the year 1782. In that year, and about the same time that Lord Carleton was appointed to the Chief Justiceship of this Court, the late Lord Avonmore, then Chief Baron Yelverton, was appointed to be the Chief Baron of the Court of Exchequer ; and shortly after he nominated and appointed his relative and friend, Mr. Charles O'Keeffe, to be his crier. I mention this circumstance of relationship to the Lord Chief Baron, because it covers all the remarks upon the successive appointments which it will be necessary for me to make. Every succeeding crier was a gentleman of ability and substance—some of them even professional gentlemen, and all of them persons of the highest respectability—a circumstance not at all immaterial in the case, when their dismissals are taken into consideration ; for it is perfectly obvious, that if gentlemen of their condition were illegally and improperly dispossessed of their situations, they would not have rested satisfied, but would have had the question tried before a competent tribunal.

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Mr. Charles O'Keeffe was, as I have stated, appointed by Chief Baron Yelverton, and he continued to perform the duties of crier, by himself or deputy, until the appointment of Lord Guillamore, at that time Mr. O'Grady, to be the Chief Baron in the year 1806; when he nominated a near relative of his own, his brother Mr. Carew O'Grady, to fill the office, and who continued to perform the duties thereof, by himself or deputy, until the retirement of his Lordship. Lord Guillamore was succeeded by Chief Baron Joy: and Chief Baron Joy, acting upon established custom, dismissed Mr. O'Grady from the office, and appointed his nephew, Mr. Henry Joy, who in the same way continued to exercise the duties of the situation up to the time of his uncle's death, when Chief Baron Woulfe, his successor, made a new appointment. He also appointed his relative, Mr. Stephen Flanagan, to the office. However, it was one of very limited duration, as his Lordship died in a very short time, when Chief Baron Brady removed him, and appointed the present crier.

Thus, it appears, that we have a succession of appointments from the year 1782, met by corresponding dismissals upon the occasion of every Chief Baron coming into office. We have gentlemen of ability, rank, and profession, removed at pleasure by the Chief Baron for many years past, and the patronage bestowed by the in-coming Judges. That circumstance may distinguish the Court of Exchequer from the other Courts, and render the appointments there of greater validity as precedents. In the other Courts, the Chief Justices, as I have shown, had the same power of appointment, which they have always exercised; and although they have not generally created a vacancy in the office of the crier on their appointment, it was not because they had not the power to do so, but because the situation was an inferior one. It is, therefore, quite manifest that the Chief Justice of this Court had the power of removing the applicant at pleasure, and that the Court has not jurisdiction to inquire into the reasons for so doing.

For these reasons, upon a review of the precedents, and upon reverting to the words of the statute which provide "that the office of crier shall remain as heretofore," and advertent to the Common Law, I have come to the conclusion, that the late crier George Kennedy held his office at the will and pleasure of the Chief Justice, appointable at his pleasure, and dismissable at his pleasure; and that the Chief Justice is not to be required to state why he made the appointment, or why he has thought proper to dismiss him. In conclusion, I hope that I have succeeded in distinguishing the office of crier from that of the other officers of the Court, touching the question of his appointment and dismissal. The Court has, in my mind, the jurisdiction of not permitting any person to invade the rights of its officers. I consider that the power of this Court is derived both from the Common Law and from statute, which, giving it, as incidental to its high authority, the power to punish, gives it

also the power to protect every officer whose rights may be invaded or disturbed in the execution of his duty.

I am aware that I differ in opinion from my Brethren on this part of the case, as they consider that the Court has no power whatever to interfere in an application of this nature; whereas I conceive that we have full jurisdiction to entertain, and redress, the complaint of an officer *de facto* disturbed in the execution of his duties; distinguishing this case of the late crier, as not being such an officer of the Court, by reason of the powers vested in the Chief Justice, to appoint or dismiss such officer at his pleasure; and no power resting with us to interfere, either with his appointment, or his dismissal. For those reasons, I am of opinion, that we should say no rule on this application.

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BALL, J.

I think it right, after the judgment which has just been delivered by my Brother Torrens, to say a few words as to the view which I have taken of this case, and upon the reasons which have induced me to come to the same conclusion, although upon different grounds. An application was made to this Court, upon the part of the late crier, to be restored to the emoluments and duties of his office; and the ground of the application was, that he had been illegally removed from it by the Lord Chief Justice. Now, my impression and conviction is, that this Court has no jurisdiction whatever to entertain the subject matter of that complaint; and I have arrived at that conclusion, believing that the applicant has mistaken his proper remedy, if he has been aggrieved, as he has stated himself to have been. A summary application to this Court on the part of one of its officers, complaining that the Chief Justice had dismissed him without being entitled to do so in point of law, is a proceeding that cannot be entertained here; but I will say that if the applicant has been illegally removed, his right and title may and can be asserted in another place—at the bar of another tribunal: but to put this Court into action, it should be shown that it has the jurisdiction to give effect to its judgments by some process known to, and recognised by, the law, and capable of being acted on.

Now, suppose for a moment that we had entertained the present complaint, and had come to the conclusion that the Chief Justice had not the power to remove any officer of the Court, and that consequently the late crier had been illegally deprived of his office, I would ask, how were we here to give effect to that decision, and by what process could we reinstate him? In a word, do we possess any jurisdiction to which we cannot give effect by some subsequent proceeding known to the law? Certainly not. Under these circumstances, entertaining, as I do, a strong impression that the Court possesses no such power as that which

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the applicant in this case seeks to put in motion, I shall abstain from giving any opinion respecting the right of the Lord Chief Justice to remove him from the office in question; yet this I will say, that if the party complaining considers that his rights have been violated, he has his remedy in another place, by a proceeding known to every professor of the law. In the mean time, I am of opinion, that the Court has no power to pronounce any rule upon this motion.

JACKSON, J.

I am also of opinion that the Court should pronounce no rule on this motion. The application, as has been before mentioned, is one brought forward by the late crier of this Court, not by Counsel on his behalf, but by himself in person, to obtain an order from us for the payment of his last quarter's salary; and likewise to restore him to the office of crier, from which he alleges himself to have been improperly and illegally removed by the Lord Chief Justice of this Court. Now, I had an early impression, when this application was first made, that the Court had no jurisdiction to entertain the subject upon motion; but from the manner in which it was brought forward—I mean the claimant being without the assistance of Counsel—I was anxious that the case of this humble individual should receive the fullest consideration. For this reason it was that the Court did what otherwise it would not have been disposed to have done; it allowed the applicant's statement to be delivered to the officer of the Court, in order that we might have the opportunity of looking into it, and of consulting the authorities bearing on the question raised by it.

My opinion, concurring with that of my Brother Ball, is, as I have already announced it, that the Court has no jurisdiction in the case upon motion. If the claimant have the right he claims, and if he have been illegally ousted of it, he can have redress in another place, and by another proceeding. I do not, however, mean to say that an action might not be brought by him to try the question of right in this Court. An action for money had and received, might be brought against the person appointed to succeed Kennedy in this office, for the amount of fees received by him, to which Kennedy claims to be entitled; and no doubt we would be bound to entertain it, and incidentally to try the question of right to the office. But even if he succeeded therein, we could not restore to him the office. In like manner, if an assize were brought, stating that the office of crier was his freehold, and that he was illegally removed from his office, a legal adjudication of the Court might be had on the question; but on this motion we cannot make any rule; for in my opinion, we do not possess the means of enforcing any order we might make on the subject. There is no doubt but that the Court has the power of

inquiring into the conduct of their officers, as has been said, and of punishing them if necessary ; for that is a jurisdiction which is of necessity inherent in every Court : but it is a very distinct question, whether we can pronounce any judgment on the right of appointment or dismissal by the Chief Justice ; and believing that we have no such jurisdiction, I shall, therefore, abstain from discussing, or giving any opinion concerning such a right. His Lordship, as I understand, denies that he is accountable to this Court for his acts in these respects, and as I conceive, rightly. It is sufficient for me that the Chief Justice claims the right in question, and has in this instance exercised it. I shall, therefore, merely express my concurrence in the judgment of the Court, that there shall be no rule on this motion.

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DOHERTY, C. J.

I have abstained from taking any part in the consideration or discussion of this case, though I have not felt it necessary formally to withdraw from Court. My Brethren having now pronounced their opinions, I am desirous of saying a few words.

Without pronouncing any judicial opinion as to the right, I may say, that in what I have done, I acted under the impression that in all the Superior Courts in Ireland the Chief Judges have, from time immemorial, appointed the crier in their respective Courts—that those appointments are during pleasure ; and that being the case, I thought I had a right to remove my appointee without assigning any reason for doing so. If this be an unfounded or erroneous view of my rights in this respect, I hope, and believe, there is a tribunal competent to correct me.

I shall only add, in reference to what was publicly stated at the time the application was made to this Court by the late crier, that I have not acted lightly, wantonly, or capriciously on this occasion ; I acted upon the firm conviction that I was entitled by law to remove the crier of this Court ; and I am conscientiously persuaded that I was well warranted, and that it was becoming in me to do so under the circumstances.

No rule.

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AUNGIER and another v. ENGLISH.

Jan. 21.

The Court will not allow a plaintiff to change the venue, without some special grounds being stated.

In this case, which was an action for use and occupation, issue had been joined in Hilary Term 1844, and notice of trial served for the last Spring Assizes at Mullingar, which was withdrawn.

Mr. *James Plunket* now moved, on behalf of the plaintiffs, without affidavit, for liberty to amend the declaration, by inserting the words "as executors" throughout the declaration, after the names of the plaintiffs; and also for liberty to change the venue from Westmeath to Dublin. The first branch of the motion was not opposed. As to the second branch, Counsel stated that a plaintiff may change the venue by way of amendment, without laying special grounds for the application, it being almost a matter of course in this country, though in England it certainly is otherwise: *Brown v. Lambert (a)*; *Ferg. Prac.* 883.

Mr. *A. Codd* and Mr. *Coffey* opposed the motion, and contended that the motion would only be granted on very special grounds at any stage of the proceedings, much less after a notice of trial had been served: *Ayres v. Burton (b)*; *Fife v. Bonsfield (c)*: and so it was decided in the Court of Queen's Bench in this country in Michaelmas Term 1843, in the case of *Administrators of King v. Sharry*.* Here no grounds are stated for the interference of the Court.

DOHERTY, C. J.

It certainly is not the established practice in this country, that a plain-

(a) 4 Law Rec. O. S. 266.

(b) 6 Taunt. 408.

(c) 2 D. P. C. N. S. 705; S. C. 7 Jur. 491.

* *Administrators of KING v. SHARRY.*

M. T. 1843.
Queen's Bench.

MR. L. STUDDERT, on behalf of the plaintiff, moved to amend the declaration by changing the venue from Westmeath to Dublin; and cited *Brown v. Lambert*. There was no affidavit.

Mr. *A. Codd* opposed the motion, and cited *Ayres v. Burton* and *Fife v. Bonsfield*.

BURTON, J.

We are of opinion that the motion cannot be granted. The last case cited by the defendant's Counsel is directly in point, and the remarks of the learned Judge thereon appear to me to be very just.

Motion refused.

tiff has a right to change the venue at any stage of the proceedings he may think proper to do so. Such a privilege would be most dangerous. Some grounds must be laid for influencing the discretion of the Court ; and none have been laid in this case. We must, therefore, refuse that part of the motion with costs.

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LARKIN and others v. LAWDER.

Jan. 27.

TRESPASS quare clausum fregit. This was a motion on behalf of the defendant, that the proceedings should be stayed until the plaintiff, or Montgomery Robins, Esq. (who was his landlord), should have given security for payment of defendant's costs, in the event of his being entitled to recover the same ; and also, that the plaintiffs should be ordered to furnish a bill of particulars of the time when, and the place where, the particular acts of trespass complained of in the declaration were committed, specifying and describing the said places either by metes or bounds, or by a map showing the boundaries thereof ; and that the time of pleading should be extended until four days after such bill of particulars should have been furnished. This motion was grounded on the declaration in the pleadings and proceedings in the cause of *Condron v. Robins*, and on an affidavit filed. It appeared by the affidavit, that an action of trespass had been brought in April 1841, by the said Condron, who was tenant of the defendant, against the said Mr. Robins, for trespass on the bog of Clonmacnoise, in which the plaintiff in that action obtained a verdict with costs. In January 1844, a *capias* had been served on the defendant by the said Robins, who claimed said bog, or a part thereof ; but no further proceedings having been taken in that suit, and a rule for *non pros.* having been served, the said Robins discontinued the action with costs. In October 1844, this action was commenced by the plaintiffs, who were tenants of the said Robins, and whose attorney was their attorney, and was alleged to be for the same cause of action as the previous one by Robins. It was also sworn, and not denied, that the plaintiffs were paupers, and had admitted that Robins was to pay the costs of the action. It also appeared, that the said bog was undivided, and that the defendant could not ascertain from the declaration what portion the plaintiffs claimed ; and that a knowledge of that fact by means of a map,

A pauper tenant bringing an action of trespass for injury to his holding, his attorney being the attorney of the landlord, who had a short time before discontinued an action brought in his own name for the same cause of action, ordered to give security for costs.

It is not necessary, under such circumstances, to make a previous application or demand for such security.

A notice of motion is irregular if it does not state the grounds on which it is made ; and a reference to an affidavit filed is not sufficient.

A plaintiff in trespass is ordered to furnish a bill of particulars of the time

when, and the place where, the particular acts of trespass complained of were committed, specifying the boundaries by a map.

H. T. 1845. or by a more particular description thereof, was necessary for the defence,
Common Pleas. or acquiescence in the plaintiffs' claim.

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Mr. *Battersby*, Q. C., in support of that branch of the motion which prayed security for costs, cited the cases of *Egan v. Kirkaldy* (a); *Tenant v. Brown* (b); *Ball v. Ross* (c). With respect to the bill of particulars in the terms of the notice, Counsel relied on the cases of *Lessee Ross v. Ejector* (d); and *Sparkes v. Blacquiére* (e); decided in this Court.

Mr. *Pakenham*, contra.—This motion must be refused on the ground of irregularity, by reason of the notice not specifying the grounds of the motion. Moreover, it is the settled practice that when security for costs is required, a previous consent and demand should be served.—[TORRENS, J. That is only when the application is made by reason of the plaintiff being out of the jurisdiction. The notice is then against a party to the record, and his attorney may be served; but here the principal party required to be responsible for costs, is not a party to the record, and has no attorney in Court.]—In the case of *Adams v. Brown* (f), Tindal, C. J., states, "Upon a review of all the authorities, the better practice appears to me to be, to require that an application for security be made to the party or his attorney, in all cases, before coming to the Court." And the same practice was followed up in the case of *Huntley v. Bulwer* (g); *Tucker v. Horseman* (h). As to the merits of the motion, this action could not have been brought by any person but the occupying tenant; and therefore it cannot be said that he was put forward by another person, as was the case in *Egan v. Kirkaldy*, where a pauper was selected for the purpose of evading payment of costs. The Court will not call on an occupying tenant, bringing an action for an injury to his possession, even although he be an insolvent, to give security for costs, merely because his landlord befriends him: *Wray v. Brown* (i).

Mr. *Hamilton*, in reply, insisted that the notice of motion was regular, as it referred to an affidavit which stated all the facts and circumstances of the case; and cited *Osborne v. Pechell* (k), in support of the motion for security for costs.

DOHERTY, C. J.

The application for the bill of particulars, in the terms of the notice,

- (a) 3 Ir. Law Rep. 542.
- (c) 1 Scott, N. C. 217.
- (e) 6 Ir. Law Rep. 126.
- (g) 6 Scott, 247.
- (i) 6 Bing. N. S. 271.

- (b) 5 B. & C. 208.
- (d) 2 Ir. Law Rep. 25.
- (f) 2 M. & Scott, 154.
- (h) Smythe, 90.
- (k) 7 Scott, 477.

appears to us to be most reasonable, and can be easily complied with. As to the necessity of a previous application for security for costs to the party, or his attorney, before serving a notice of motion to compel it, it is admitted to be necessary when the application is made by reason of the plaintiff being out of the jurisdiction; but further than this there is no such rule in this Court; even if it should be the rule in the Common Pleas in England, which does not follow from the language of Chief Justice Tindal in the case which has been cited. On the contrary, his language implies that the practice is unsettled, and he seems rather to have sketched out what would be a good rule than what was the actual rule and practice of the Court. We shall, therefore, grant the motion, on the terms of the defendant paying the costs of it, as the Court are of opinion that the notice of motion was irregular in not specifying the grounds of the motion. It is not sufficient to say that they are supplied by the affidavit; for the opposite party ought to have the means of ascertaining how far he ought to comply with the application, and so obviate the necessity of a motion, without going to the expense of taking out a copy of an affidavit. The defendant must take short notice of trial; and let the plaintiff be at liberty to lodge a sum of money to be named by the officer, instead of giving security for costs.

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MEYLER v. MORTON.

Jan. 28.

MR. GIBBON moved to amend a plea of the Statute of Limitations, by expunging from it the words, "that the said Wm. Martin, deceased, did not at any time within six years next before the commencement of this suit undertake or promise;" and by inserting the words, "that the several alleged causes of action in the said declaration mentioned did not, nor did either of them, accrue to the said plaintiff at any time within six years next before the commencement of this suit." A demurrer had been filed to said plea; and a consent served on the part of the defendant, that he should be at liberty to amend, upon the terms of allowing the demurrer, and paying the costs thereof, and the costs of amending the replication. No affidavits were filed.

Amendment of a plea of the Statute of Limitations will be allowed after special demurrer, and before argument, without any affidavit of merits.

Mr. Henn, Q. C., and Mr. Atkins, contra.—We admit that the general rule is, that where a special demurrer has been filed to a plea, the defendant will be allowed to amend on payment of costs; but a distinction

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has been made by the Courts with respect to pleas of the Statute of Limitations, that they will not allow amendments to be made, unless it appears on affidavit that the defendant has merits: *Latouche v. Spence* (a); *Domville v. Lane* (b).

Mr. Gibbon.—This Court has decided that even if affidavits had been filed, they would not have been allowed to be read; *Brennan v. Monahan* (c).

Mr. Henn, Q. C.—In *Brennan v. Monahan*, the Court merely decided that they would not go into long affidavits for the purpose of spelling out the facts of merits or no merits; which is quite consistent with the principle that there must be some affidavit of merits.

DOHERTY, C. J.

We think it better to adhere to the rule laid down by us in *Brennan v. Monahan*, where we ruled the principle that amendments are to be allowed in all cases before argument, without reference to the nature of the defence; and that even if affidavits had been filed, we should not have permitted them to be read. We shall, therefore, grant the motion without costs, the defendant to amend forthwith, and take short notice of trial.

(a) 1 T. R. 155.

(b) 1 Cr. & D. 184.

(c) 4 Ir. Law Rep. 415.

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Exch. Cham.

Exchequer Chamber.

THOMAS MAUNSELL WILSON, in Error,

v.

JOHN LOVELAND,

Lessee of the Rev. JAMES WILSON FORSTER, Clerk.

[In Error.]

(From the Exchequer of Pleas.)

Nov. 13.

THIS was a writ of error brought to reverse a judgment of the Court of Exchequer. The action was an ejectment for non-payment of rent; and the question to be decided was raised by a special verdict, which is fully set out, *ante*, pp. 197-202. The judgment of the Court below was in favour of the plaintiff in that Court.

Mr. *Bennett*, Q. C., with whom was Mr. *Moore*, Q. C., Mr. *O'Brien*, Q. C., and Mr. *M. Barry*, for the plaintiff in error.

The special verdict having found that the lands in the declaration mentioned were the glebe lands of the rectory of Emly Grenan; the question for the decision of the Court is, whether those lands were not, by the operation of the Order in Council, and of the several Acts of Parliament under which that order was made, transferred to the Ecclesiastical Commissioners; or whether they remained in the Rev. Mr. Forster, the present treasurer. In determining this question, it will be necessary to consider the operation of the several Acts of Parliament which authorise this Order of Council; for if the Lord Lieutenant and Council were not competent to make a partial disappropriation of a parish, as we contend they were not, the Court cannot hesitate to apply the well known and familiar rule of construction to this order, that the Lord Lieutenant and Council intended to exercise the power and authority confided to them, in a manner consistent with the law; and will reject a contrary construction. The first proposition, therefore, for which we have to contend is, that the several statutes which authorise the disappropriation of parishes, authorise a total disappropriation alone, and not a partial one.

The Lord Lieutenant and Privy Council have authority, under the Church Temporalities Acts, to make a partial disappropriation of a rectory or vicarage, by disuniting the tithe or the glebe lands from it.—*Dissentiente CRAMPTON, J.*

Where an order of the Lord Lieutenant and Privy Council, made under the Church Temporalities Acts, disappropriating the rectory of E. from the dignity of the treasurer'ship of the Cathedral Church of St. M., contained a recital distinguishing that part of the income which arose from the rent of the glebe

lands from the other revenues of the rectory, which consisted of tithe rent-charge, and when the operative words of the Order in Council, were—"the said parish or rectory of E., and the rectorial tithes thereto belonging;" *Held*, confirming the judgment of the Court of Exchequer, that according to the true construction of the order, the word "rectory" did not include the glebe lands, and that, therefore, they did not pass to the Ecclesiastical Commissioners, but continued annexed to the treasurer'ship.—*Dissentiente CRAMPTON, J.*

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The first Act on the subject is the 3 & 4 W. 4, c. 37,* the preamble of which intimates that the ultimate object of the Legislature was the advancement of religion, by the suppression of sinecures, and by the provision for the cure of souls; and the 124th section, which prescribes the mode of disappropriating, in its recital, refers to "parishes, or tithes or portions of tithes, and glebes thereof, united to certain dignities," and provides for their separation *in toto*, and erection into distinct benefices; but does not authorise a partial disappropriation, or justify the splitting, as it were, of the property of a parish into portions, unless in cases where part of a parish had been previously united to a dignity; when that part might be disappropriated, but not a part of such part. In like manner, the subsequent statute 4 & 5 W. 4, c. 90,† which gives the power to annex the

* 3 & 4 W. 4, c. 37, s. 124.—"Whereas several parishes, or the tithes or portion of
 "tithes and glebes thereof, are appropriated or united to certain archbishopricks,
 "bishopricks, deaneries, archdeaconries, dignities, prebends, or canonries; and it is
 "expedient that the same should be disappropriated, disunited, and divested out of such
 "archbishopricks, &c., and vested in the respective vicars or curates discharging the
 "duties of the parishes in which the said benefices, tithes, or portions of tithes are
 "respectively situate: be it therefore enacted, that it shall and may be lawful for the
 "Lord Lieutenant, or other Chief Governor or Governors of Ireland for the time being,
 "and his Majesty's Privy Council there, in the case of any and every archbishoprick,
 "&c., by and with the consent and approbation of the archbishop, &c., thereof, or
 "whenever such archbishoprick, &c., shall be void, to disappropriate, disunite, and
 "divest any rectory, vicarage, tithes or portions of tithes, and glebes, or part or parts
 "thereof, from and out of any archbishoprick, &c., and to unite any such rectory, vica-
 "rage, tithes or portions of tithes, to the vicarages and perpetual or other curacies of
 "such parishes respectively, so that each such rectory, vicarage, tithes or portions of
 "tithes, and glebes, or part or parts thereof, shall, with its respective vicarage, per-
 "petual or other curacy, form a distinct parish or benefice."

† 4 & 5 W. 4, c. 90, s. 5.—"And whereas the provisions of the said Act for the
 "disappropriation of parishes, or the tithes or portions of tithes and glebes thereof
 "from the dignities to which the same may be united or appropriated, are limited to
 "cases in which there are vicars or curates discharging the duties of such parishes;
 "and it is expedient to remove such limitation; be it therefore enacted, that where
 "there shall not be any vicar or curate in any parish which, or the tithes or any por-
 "tions of the tithes and glebes whereof, may be appropriated or united to any arch-
 "bishoprick, bishoprick, deanery, archdeaconry, dignity, prebend or canonry, it shall
 "and may be lawful for the said Lord Lieutenant, &c., and Council, if they shall so
 "think fit, by and with the consent and approbation of the archbishop, &c., thereof, or
 "whenever such archbishoprick, &c., shall be void, to disappropriate, disunite and
 "divest such parish, and all tithes, portions of tithes, or glebes thereunto belonging,
 "from and out of such archbishoprick, &c., and if they shall so think fit, to order and
 "direct that such parish, tithes, or portions of tithes or glebes, so disunited, shall from
 "thenceforward be united and annexed to any neighbouring rectory, vicarage, or per-
 "petual curacy, as hereinafter mentioned, or shall be and become for ever a separate
 "benefice and parish."

Section 7.—"And be it further enacted, that in any case in which the said Lord
 "Lieutenant, &c., and Council, shall have power and authority under the provision of

property to a neighbouring parish, in cases where there is no vicar or curate, only contemplates a total disappropriation. The same observation applies to the 3 & 4 Vic. c. 101,* which invests the Lord Lieutenant and Council with the power of transferring the whole benefice, or the entire of the portion previously appropriated to the dignity, to the Ecclesiastical Commissioners. If therefore, these statutes do not authorise a partial disappropriation, the Court will not give to this order a construction which would render it illegal or inoperative.

With respect to the terms of the order, we contend that the word "rectory," *eo nomine*, necessarily includes the glebe, and that the exception of it, as contended for here, would be void and against the policy of the law. "A rectory, or parsonage, consists of glebe, tithe, and oblations established for the maintenance of a parson or rector having cure of souls within the same parish:" *Com. Dig. Ecclesiastical Persons*, C. 6; 1 *Sid.* 191, *Glebe*, A.; *Vin. Ab. Grant*, A. 16; *Godolphin Rep.* 409. A lease of a rectory, excepting the glebe, is a void exception; for no rectory may be without a glebe; but he may except parcel of the glebe: *Winch.* 23; *Hobart Ca.* 295; 1 *Deacon and Young*, 49, 50; *Shepherd's Touchstone*, 93; *Cro. Car.* 169. The result of the authorities is, that the word "rectory," *ex vi termini*, operates to pass the glebe; and that a grant of a rectory excepting the glebe would be void; and therefore, if the law is opposed to a severance of the glebe from the rectory, the Court will not give such a construction to the Order of

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"the said recited Act, or this Act, and shall think fit so to disappropriate, disunite, and divest any rectory, vicarage, tithes or portions of tithes, and glebes, or part or parts thereof, from and out of any archbishoprick, &c., it shall and may be lawful for such Lord Lieutenant, &c., if they shall so think fit, to unite and annex to any adjoining or neighbouring rectory, vicarage, or perpetual curacy, as aforesaid, such rectory, vicarage, tithes or glebes, or any part or parts or portions thereof respectively, which shall have been so disappropriated, disunited, or divested as aforesaid, together with the actual cure of souls within such rectory or vicarage, or such part or parts thereof as shall be so united or annexed respectively, or within such place or places respectively, whereof the tithes or glebes shall be so united and annexed."

* 3 & 4 Vic. c. 101, s. 5, enacts "that so much of the said recited enactment (4 & 5 W. 4, c. 90), as empowers the said Lord Lieutenant and Council to unite and annex any parish, tithes or portions of tithes, or glebes, so disunited, to any neighbouring rectory, vicarage, or perpetual curacy, shall be, and the same is hereby, repealed."

Section 6.—"And he it enacted, that in lieu of uniting and annexing any parish, tithes or portions of tithes, or glebes, so disunited, to any neighbouring rectory, vicarage, or perpetual curacy, it shall be lawful for such Lord Lieutenant and Council, if they shall not think fit to erect the same into a separate benefice or parish, to order and direct that such parish, tithes or portions of tithes, or glebes, so disunited, shall be transferred to the said Ecclesiastical Commissioners, or the right and interest in and to the same, and all the arrears thereof, shall thereafter vest in the said Commissioners," &c.

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Council as will sever the one from the other, on surmise and conjecture as to what may have been the intention of the framers of it. There are no words of exception in this statutable conveyance, and therefore, the rectory which is granted by it, includes the glebe, as the rent follows a grant of the reversion; and to import such an exception into this Order of Council, would be contrary to the intention of the statutes, the policy of the law, and the language of the order itself.

Mr. *Rogers*, and Mr. *Whiteside*, Q. C., for the defendant in error.—In the first place, that the Lord Lieutenant and Council had the power to make a partial disappropriation, is plain from the language of the several statutes which have been adverted to on the other side.

The 124th section of the 3 & 4 *W.* 4, c. 37, gives express authority “to disappropriate, disunite, and divest any rectory, vicarage, tithes, or “portions of tithes, and glebes, or part or parts thereof,” from any dignity: and the subsequent statutes use similar language. It is a strong circumstance to influence the construction of the Order in Council, that the Lord Lieutenant and Council did not exercise the power, which they certainly possessed, of abolishing or suspending the dignity of the treasurer’ship, and that the office is still in existence; for it could not have been the intention of the Lord Lieutenant and Council to leave the office of treasurer in existence, and to impose on somebody the discharge of the duties, but to strip it altogether of emolument. The words of the order itself negative such an intention; for in reciting the emoluments belonging to the union, it separates the several rectories, and the tithe rent-charge belonging to each; and goes on to recite that there is an income belonging to the treasurer arising out of demised lands, which is not included in what has been called the operative part of the order, in which the words used are, “rectory and rectorial tithes.” The word “rectory” alone would have been sufficient; but the addition of the words “rectorial tithes” indicates an intention of qualifying or restricting the word “rectory,” and giving it a less extensive meaning than it would otherwise receive. We do not controvert any of the authorities cited on the other side with respect to its ordinary meaning and signification; the word “rectory” includes the glebe; but we contend that the word is used in this order not in a strictly legal, but in a popular sense.

Mr. *Moore*, Q. C., in reply, referred to the rule of construction of instruments laid down by Sir John Leach in the case of *Hume v. Ruedell* (a), in which he says: “although in the construction of instruments, “it is the duty of the Court, not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument

(a) 1 Sim. & St. 177.

"together ; yet the Judges are not authorised to deviate from the force of a particular expression, unless they find in other parts of the instrument expressions which *manifest* that the author of the instrument *could not* have the intention which the literal force of a particular expression may impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every Court is bound by it, unless it be plainly controlled by other parts of the instrument."

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[The CHIEF BARON called attention to the case of *Moseley v. Motteux* (a), in which it was held, that an advowson appurtenant to a manor, was not bound by a recovery, though the words were large enough to have passed it, by reason of the intention of the parties apparent on the face of the deed, although arising out of a mistake as to their title.]

Cur. ad. vult.

JACKSON, J.—[After stating the facts of the case, as they appear on the special verdict, his Lordship proceeded as follows :]—

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The first question for our consideration and decision in this case, arises on the construction of the Acts of Parliament, whether they authorized a partial disappropriation of a rectory or vicarage, or whether the Lord Lieutenant and the Privy Council, if they disappropriated at all, were bound to do so wholly. My opinion is, that, on the true construction of these Acts of Parliament, the Lord Lieutenant and Council, in disappropriating a rectory or vicarage, were not bound to disappropriate the same *in toto* ; but that a power is vested in them by these Acts to disappropriate partially, that is to say, that if they thought proper to leave a competent portion of the revenues of an ecclesiastical dignity with it, they had power to do so ; and if, on the other hand, they should think fit so to do, they might transfer the whole of them to the Ecclesiastical Commissioners.

The first enactment to which I shall call attention, is the 124th section of the 3 & 4 W. 4, c. 57 ; and it will be well to observe the language of that section. After reciting that "Whereas several parishes, or tithes, or portions of tithes and glebes thereof, are appropriated or united to certain dignities, &c., and it is expedient that the same should be disappropriated, divested, and disunited out of such dignities, and be and become vested in the respective vicars or curates discharging the duties of such parish, in which such benefices, tithes, or portions of tithes are respectively situate ;" it enacts, that "It shall be lawful for the Lord Lieutenant and Council to disappropriate, disunite, and divest any rectory, vicarage, tithes or portions of tithes, and glebes or

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"part or parts thereof, from and out of any dignity, &c., and to unite any such rectory, vicarage, tithes or portions of tithes, to the vicarages, and perpetual or other curacies of such parishes respectively; so that each such rectory, vicarage, tithes or portions of tithes, and glebes, and part or parts thereof, shall, with its respective vicarages, perpetual or other curacy, form a distinct or separate parish." Now, on that enactment, it is insisted, that the Legislature intended, that a rectory or vicarage, if disappropriated at all, should be disappropriated *in toto*; and the words relied on in confirmation of that view, are the words "tithes or portions of tithes, and glebes, or part or parts thereof," which it is contended only refer to tithes and glebes, and do not extend back to "rectory or vicarage." In the next statute, however, to which I shall refer, viz., the 4 & 5 W. 4, c. 90, I think we shall find that the Legislature gave the meanings to those expressions in the former Act, which they intended they should bear. In the 6th section it enacts, "That where under this, or any other Act, any parish in which there shall be any perpetual curate, shall be disappropriated or disunited from any ecclesiastical dignity or benefice, such curate shall immediately on such disappropriation, &c., become rector or vicar as the case may be, of the parish so disappropriated, and such perpetual curacy shall merge in the said rectory or vicarage." Now, that 6th section is recited in the Order in Council; and I shall now call attention to the 7th section of the same statute, which, in my opinion, shows the intention of the Legislature, in words, which in my mind do not admit of a doubt. It enacts, that in case the Lord Lieutenant and Council disappropriate any rectory, vicarage, tithes, or portions of tithes, and glebes, or part or parts thereof, they may, if they should so think fit, "unite and annex to any adjoining or neighbouring rectory, vicarage, or perpetual curacy, as aforesaid, such rectory, vicarage, tithes, or glebes, or any part or parts or portions thereof *respectively*, which have been so disappropriated as aforesaid, together with the actual cure of souls within such rectory or vicarage, or such part or parts thereof as shall be so united or annexed *respectively*. Showing, as I conceive, by the use of the word "*respectively*," that the words "part or parts thereof," are referable to each and every thing preceding them, including "rectory or vicarage." For these reasons, I am clearly of opinion, that the construction put upon these statutes by the Lord Lieutenant and Council, and by the Court of Exchequer, is the true and proper construction. I should observe, that the last enactment to which I have referred, viz., the 7th section of the 4 & 5 W. 4, c. 90, has been repealed by the 3 & 4 Vic. c. 101, s. 7; but that circumstance does not affect my argument on the construction of the 6th section of the same Act, as it makes no alteration with respect to that section, or my argument as to the intention of the Legislature arising out of it.

Now, let us refer to the Order in Council itself: having recited the various Acts of Parliament under which it was framed, and that the treasurership of the Cathedral Church of St. Mary's, Limerick, had become vacant, and of what the income of said treasurership consisted, viz., tithe rent-charge, and a further income of £80 a-year arising from demised lands, it goes on thus:—"Now we, the Lord Lieutenant and Privy Council, having maturely considered *the circumstances* of the said treasurership, and the best mode of providing for the interest and convenience of said several parishes and rectories forming the corps thereof, do hereby, in pursuance of the power vested in us by the said hereinbefore first recited Act, order and direct that the said parish or rectory of St. Patrick's, together with the rectorial tithes thereunto belonging, be, and the same are hereby disappropriated, disunited, and divested out of the treasurership of St. Mary's, Limerick, and united to the said perpetual curacy of St. Patrick's, erected as aforesaid, within said parish or rectory of St. Patrick's. And we do hereby further order and direct, in pursuance of the 3 & 4 Vic., that the said parishes or rectories of Cahervalla, and Emly Grenan, and the rectorial tithes thereunto belonging respectively, be, and the same are hereby disappropriated, disunited, and divested out of the said treasurership, and transferred to the Ecclesiastical Commissioners for Ireland." Observe, that it was competent for the Lord Lieutenant and the Council to have extinguished this dignity of the treasurership; but they have not done so. They have left the dignity in existence, and a portion of duty to be performed by the person filling the office; and thus, having duties to perform, what do the Lord Lieutenant and the Council say? "Having maturely considered the circumstances of the said treasurership," we disappropriate and divest the rectories and the rectorial tithes thereunto belonging, without making any specific allusion to the income of £80 a-year, arising out of the demised lands. To me, therefore, it is plain, that they did not intend to deprive the dignity of that £80 a-year, or to meddle with the glebe land at all; but merely to disappropriate and divest the rectory and the rectorial tithes; because the dignity was suffered to remain in existence; and it was proper and reasonable that the person performing the duties should have an income attached to it.

But then it is said; that the term "rectory," *ex vi termini*, includes, and carries with it the glebe lands. I admit, that the word is sufficient of itself to carry the glebe, if it was so intended; and if it stood alone without any words to control it, it would have that effect; but it does appear to me that it was not so intended in this order, because, in specifying the rectory and the rectorial tithes thereunto belonging, but not the glebe lands, it was manifestly the intention that they should not be included. It has also been insisted, that we should deal with this order, and construe it as if it were a conveyance, and give to each and every

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word of it its strict technical meaning. But, in my opinion, we ought not to deal with it as a conveyance, but as what it really is, namely, an Order of the Council, which we are to construe so as to carry out the intention of the framers of it, as far as is consistent with the authority vested in them by the Legislature. If it were to be considered as a conveyance, it would appear to me to be somewhat in the nature of an execution of a power to divest an estate; and if so, ought to be strictly construed, so as to carry out the intention of the party executing, and no farther.

It is not necessary that I should go into all the learning of the law, which shows that the word "rectory" is sufficient to carry the glebe, as it must be admitted that it is amply sufficient for that purpose, if used technically. But in this instance, it is used in the same sense as it has been used by the Legislature in these Acts of Parliament, and that is clearly not in a strict technical sense, for there it is used as synonymous with the term "parish," which has not the same technical meaning in law as "rectory;" and therefore, although the term "rectory" is sufficient to carry the glebe, yet being, in this instance, used as synonymous with a word which does not convey the same complex idea in law, it may, as I conceive, be read in the more liberal meaning of the word.

These are the grounds on which I have been led to the opinion which I have stated. I think that the statutes in question did empower the Lord Lieutenant and the Council to disappropriate a rectory or vicarage partially; and by the way, it was asked, in the progress of the argument, whether any reason could be suggested why the Legislature should not have conferred that power on the Lord Lieutenant and Council? and no reason was then suggested; and I confess, that I am not capable of suggesting any. On the other hand, I can see many and good reasons why they should be entrusted with such a power. It would, for instance, be a great hardship that a dignity should be denuded of all income, as this treasurership would, if no such power was vested in the Lord Lieutenant and Council. And as I hold that such a power is vested in them, and that this order carries out such power, I am of opinion that the judgment of the Court below should be affirmed.

LEFROY, B.

I concur in the judgment which has been delivered by my Brother Jackson, and in all of the reasons which he has given in support of it. He has stated the facts of the case and the questions which have been discussed so fully, and elucidated the subject so clearly and satisfactorily, that little remains to be said. I shall, therefore, merely add a few observations which appear to me to corroborate the view which he has taken, and so ably sustained by argument; as to do more would, under the present circumstances, be a mere waste of the public time. He has

shown most satisfactorily, from the plain language of the several Acts taken together, that the Legislature intended to invest the Lord Lieutenant and the Privy Council with the powers which they have in this case exercised. I shall not, therefore, touch further upon the words of the Acts; but I would observe, in corroboration of the argument, that the construction which has been given by the Court of Exchequer to the Order in Council, is consistent with the object and policy of these statutes. Their policy was not to abolish or suspend all dignities, or to strip them of all income, and leave them destitute, but to make a provision for various objects for the better advancement of the cause of religion; and no part of that policy would be carried out by depriving an existing dignity of all income and support.

It has been observed, that the power vested in the Lord Lieutenant and Council of suspending the dignity, has not been exercised in this instance; and the inference from that circumstance is strong, that as they did not think fit to suspend, so neither could they have entertained the intention of stripping the office of all income. The policy being, as I have observed, to provide for various objects among the officiating clergy, the power of distribution and separation is obviously necessary for the carrying out of that policy in its full effect. And I may observe, that the Legislature have enumerated several things which were to be disappropriated, viz., tithe, glebe, &c.; and it is not argued that all of these are to be taken away in bulk; the Council, therefore, had the power of taking any one of these items separately from the others; and if so, why should it be considered strange that the Council should be allowed to take a portion of each of them, and vest it under the statutes? There is no inconsistency in such a construction of their powers; on the contrary, as it appears to me, such would be a clear following up of the objects and policy of the Legislature. These are the only additional observations which I have to make on the construction of these statutes.

The next question for consideration is the instrument by which the Council carry into execution the powers intrusted to them by the Legislature. It is true, that they have used the word "rectory;" and it is equally true, that the word "rectory" *per se* will carry the tithes and glebe; and that such is the *prima facie* construction of the word, whether used in an instrument of the nature of that under our consideration, or in a conveyance. On the other hand, it is equally clear, that the word may be restricted by the context, and by other terms and passages found within the four corners of the instrument in which it is used; and that such is the true and correct principle of construction is not left to general reasoning, as there are many authorities on the subject, to which it is unnecessary to refer more particularly. I shall merely refer to one, for which we are indebted to the research of my Lord Chief Baron, which illustrates the principle I have laid down in the clearest and most satis-

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factory manner; I mean the case of *Moseley v. Motteux*, which was the case of a deed leading the uses of a recovery, in which by mistake an advowson was treated as being in gross, when in fact it was appendant to a manor; and it was held, that though the terms in the recovery deed were of themselves large enough to have passed the whole advowson as appendant to the manor, yet that by reason of the intention of the parties apparent on the face of the instrument (although arising out of a mistake as to their title), the estate tail in the advowson was not barred. The principle of construction is thus laid down by the Court in their judgment in that case:—"We have no sort of doubt, that if the tenant "in tail of a manor, with an advowson appurtenant, suffer a recovery, it "is not necessary for him make any express mention of his intention to "include the advowson in the rectory. Any dealing with the manor, "which is the principal, operates in the advowson, which is the accessory, "whether expressly named or not; but it is to be observed, although the "manor *primâ facie* draws after it the advowson also, yet it is always "competent for the owner to sever the advowson from the manor, either "by conveying away the advowson from the manor, or by conveying the "manor without the advowson. And the question is, whether by the "mere grant of the manor in the deed making the tenant to the *præcipe* "in this case, the parties have not clearly shown that they meant the "manor without the advowson? If they have, it would be impossible to "contend that the law would force on parties a meaning of the word "'manor' more extensive than they, on the face of the deed, themselves "intended it to have. We think, that in this case, there is evidence "enough to show that the parties, by the word 'manor,' meant the manor "without the advowson. The deed begins by reciting that the testator "was seized of the manors, and *also of the advowson*. It then goes on "to recite the devise of the manor *not including the advowson*. It then "recites that Richard, being seized in fee of a moiety of the advowson, "devised it. Then there is a conveyance of the manor and one-half of "the advowson. It being a mere question of intention in what sense "the parties intended to use the word 'manor;' whether, as including, or "excluding, the advowson; we think it clear from the passage pointed "out, that they must have meant to exclude it, and consequently the "deed must be read as if it was so stated on the face of it; and the "consequence is, that the advowson did not pass merely by force of the "word 'manor.'" Now, the rule of construction adopted in that case should govern the present. In that case, the strict legal meaning of the word "manor" was counteracted by the addition of the moiety of the advowson; and on this case we have circumstances as strong; such as the recital of the rectory of Emly Grenan as distinct from the rent arising from the glebe lands, the addition of the words "rectorial tithes" to the term "rectory," in the operative part of the instrument, and the negative

evidence of the non-suspension of the dignity, to show that the term "rectory" was not intended to be used in the strict legal sense of the word. For these reasons, in addition to these given by my Brother Jackson, I am of opinion that the judgment of the Court below ought to be affirmed.

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BALL, J.

I am also of opinion that the judgment of the Court below should be affirmed; and if my learned Brother Lefroy found a difficulty in adding to the observations and reasons in which my Brother Jackson founded his judgment, I labour under a still greater difficulty, in adding to what has been suggested in the questions on which we have to decide, by both of them. Moreover, in a case like this, where the Court are all but unanimous in opinion, I do not feel that I am called upon to add much to what has been already said upon the subject. With respect, therefore, to the first point, as to the powers vested in the Lord Lieutenant and Council by the statutes, I shall only say, that I agree with my Brethren who have preceded me, both in their reasoning and their conclusions.

With regard to the second point—viz., that, having the power, the Lord Lieutenant and Council have by their order only disappropriated and disunited the tithe rent-charge from the treasurership, leaving the rent arising from the glebe lands with that dignity, I have arrived at this conclusion for the same reasons as those given by my Brethren Jackson and Lefroy; and I may further state, that reading this instrument, and inferring the intention of the parties making the order from what is contained within the four corners of it, it is, in my mind, clear, that though the term "rectory," *per se*, *primâ facie* carries both glebe and rent-charge, yet, in this instance, there is abundant evidence of an intention not to use that word in its extended, but in a restricted sense, as carrying the rent-charge, but not the glebe. The order, I find, recites that the corps of the treasurership consists of, *inter alia*, the rectory of Emly Grenan (the place in question); and it further recites, that the revenue of said rectory consists of rent-charge £112. 10s., and then, that "there is a further income, *belonging to the treasurership*, arising from demised lands, amounting to the yearly sum of £80. 6s. 1½d." Thus, the order takes a distinction between the income belonging to the treasurership, and the tithe rent-charge. Such being the case, the order then proceeds to deal with several of the particulars of which the corps of the treasurership is composed, and disunites what is described as the rectory of Emly Grenan, having for its revenue a certain amount of tithe rent-charge, which it vests in the Ecclesiastical Commissioners; but it is altogether silent as to the other portion of the income of the treasurership, and which was described as "a further income." Therefore, without going out of the order itself, there is abundant evidence that the framers of it

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had no intention of including in the term "rectory," that which was before described as a further income belonging to the treasurership, and not described as belonging to the revenues of the rectory. It is, in fact, silent in intention, and in terms, as to this further income arising from glebe lands, which is therefore left untouched by this order. For these reasons, in addition to those of the Members of this Court who have preceded me in delivering their judgments, I am of opinion that the judgment of the Court of Exchequer should be affirmed.

RICHARDS, B.

The word "rectory" is abundantly sufficient to pass the glebe lands of Emly Grenan; and unless it can be shown that such was not the intention of the Lord Lieutenant and Council, to be collected from the instrument before us, I should be of opinion that the general words here used would have the effect of disappropriating and transferring the same to the Ecclesiastical Commissioners. Agreeing, as I do, with my Brethren who have preceded me, as to the construction which ought to be given to the several Acts of Parliament which have been referred to, the important and difficult question in the case turns altogether on the construction of the instrument which has been executed by the Lord Lieutenant and the Council. On the one hand, it is admitted, that the glebe lands of Emly Grenan have not been excepted, *eo nomine*, out of the operative parts of the order, nor anything else in terms; and if we were to confine ourselves to that portion alone of the instrument in question, it would be difficult to hold that every thing which could pass by the term "rectory" did not pass. But looking to the other parts of the same instrument, whether it is to be considered as a deed *inter partes*, or as a mere execution of a power conferred by an Act of Parliament, we are to give it such a construction, as far as the rules of law will permit, as will render all the parts of it consistent.

Although the word "glebe" does not occur in this order, and it is nowhere stated in it that the demised lands were glebe, yet it appears clearly, that it was not the intention of the framers of it to disappropriate from the corps of the treasurership, the £80 per annum which is stated to have belonged to it. It so happens that this £80 per annum arises out of the glebe lands, including the subject of controversy in this action. As far as the intention is to be deduced from mere inference, it is manifest, I say, that the Lord Lieutenant and the Council did not intend to deprive the treasurership of this annual income of £80; confining, therefore, our attention to this instrument, we must necessarily hold that there was not any intention of disappropriating this £80 per annum; and if we look beyond the instrument, we shall find the fact found in the special verdict, that this £80 per annum arose out of the glebe lands; which glebe lands, therefore, were intended to remain as an

emolument attached to the office of treasurership. It occurred to me, that the Lord Lieutenant and Council were not aware of the fact that this income arose from glebe lands, but was a part of the income of the treasurership that might have arisen from some other source, and that they, therefore, did not intend to touch it; and if such were the fact, are we to set up an inference to defeat their intention, though it be a legal inference, I admit, from the use of the word "rectory?" It is manifest, on the face of the instrument, that it was not meant to take in something else beyond the tithe rent-charge: and are we to defeat that intention by giving a meaning to a word, which it may bear in point of law, but which it cannot bear if the intention of the parties is to be carried out? I think not; and for these reasons, and agreeing, as I do, with my learned Brethren as to the construction of the Acts of Parliament, I am of opinion that the judgment of the Court below ought to be affirmed.

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PERRIN, J.

I am also of opinion, that the judgment of the Court of Exchequer should be affirmed. I do not think that the act of the Lord Lieutenant and Council is to be construed as if it were a deed *inter partes*; and therefore, it is quite clear to me that they have not, by their order, disappropriated the glebe lands of Emly Grenan; nor was it their intention to do so. I am also of opinion, that they had full authority under the statute to disappropriate a portion of a rectory, and transfer it to the Ecclesiastical Commissioners; and as for the term "rectory" carrying the glebe in it, the case of *Mosely v. Motteux* shows that the original and strict legal meaning of a term is not necessarily to be ascribed to it in an instrument, but may be restricted by recitals, such as, in this case, show, that it was not in the contemplation of the Lord Lieutenant and Council to pass this annual income of £80. 6s. 1½d. arising from the demised lands, or any part of it, to the Ecclesiastical Commissioners. I am, therefore, of opinion, that the judgment of the Court of Exchequer should be affirmed.

CRAMPTON, J.

This is in form an ejectment for non-payment of rent; but it is virtually an ejectment to try the title of the lessor of the plaintiff to the lands in the declaration mentioned. Those lands are the glebe lands of the parish of Emly Grenan, and are so described in the declaration. The lessor of the plaintiff, the Rev. Mr. Forster, is the treasurer of the Cathedral Church of St. Mary's, Limerick; and in *that* character he claims the glebe, as being part of the corps of his dignity. The defendant is a lessee of the premises under a lease of the year 1835, made to him by the late Rev. Mr. Quinn, a predecessor of the plaintiff in this treasure-ship. The defendant admits his liability to pay the rent reserved by the

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lease of 1835, but he contends that the title to that rent, and to the glebe out of which it issues, has been divested from the treasurer of the Cathedral of Limerick, and become, under an order of the Lord Lieutenant and Privy Council, vested in the Ecclesiastical Commissioners; and the question we have to decide is, whether upon the facts stated in the special verdict, the title to this glebe of Emly Grenan be now in the lessor of the plaintiff, or in the Ecclesiastical Commissioners.

It appears by the special verdict, that before the year 1841, the rectory or parish of Emly Grenan was part of the corps of the treasurership of the Cathedral Church of Limerick, or, in other words, the rectory of Emly Grenan had been appropriated to the treasurership. The result of which is, that the treasurer was, in right of his dignity, the rector of the parish of Emly Grenan, and thereby entitled to the tithes and glebe belonging thereto; and had the cure of souls therein. In 1841, the treasurership being then vacant, the Lord Lieutenant and Privy Council exercised the jurisdiction given to them by the Church Temporalities Acts, and made the order of the 25th of February 1841, upon which the defendant below relies as vesting the glebe in question in the Ecclesiastical Commissioners. The true meaning and effect of this Order in Council is the great question in the case. The defendant below contends, that under that order, the glebe, as part and parcel of the rectory of Emly Grenan, was, with the rectory, divested out of the dignity, and vested in the Ecclesiastical Commissioners. The lessor of the plaintiff, on the other hand, contends that the rectory was divided into portions; and although the tithe or composition rent was disappropriated and divested out of the treasurership, and vested in the Commissioners, yet that the glebe was not disappropriated, but remained with the dignity, and did not pass to the Commissioners. It must be admitted (as I believe it has been) upon the argument, whatever be the effect of this Order in Council as to the glebe in question, that the rectory of Emly Grenan was thereby disappropriated from the treasurership, and vested in the Ecclesiastical Commissioners. The result of which is, that the present dignitary is not, and never was, the rector of the parish of Emly Grenan, but that the Ecclesiastical Commissioners are now the improper rector of that parish. The claim, therefore, of the Rev. plaintiff in this case, is not that of the rector of a parish seeking to recover the glebe of his parish; but it is the claim of a person seeking to make title to a glebe against the rector of the parish, to which parish the glebe of right belonged. This consideration will aid us (I think) in no small degree, in ascertaining in which of the litigant parties the glebe in question is now vested. If then we ask, who is now rector of the parish of Emly Grenan,—the answer admittedly is, not the treasurer, but the Ecclesiastical Commissioners. Now, of common right, and by the common law, the glebe of a parish belongs to the rector;

and nothing short of a statutable enactment can sever it from the rectory : let us see whether such severance has been made in the present case.

It is conceded, on all hands, that the words of the operative part of the Order in Council are in themselves sufficient to pass the glebe ; and that primarily, and unless something appear on the face of the instrument to control their operation, that the glebe must go with the rectory, of the revenues of which it was a component part. It is also clear, that all which was disappropriated from the dignity passed to the Commissioners. On the plaintiff's part, it is argued that the word rectory is not used in the operative part of the instrument in its ordinary acceptance, but that it means *there*, the rectory *except* the glebe ; and it is further urged that such is the plain intention of the instrument, and that such intention should control the sense of the operative words of the order.

Now, let us examine the order itself—premising that such an order is but the execution of a power vested in the Lord Lieutenant and Privy Council, by the statutes before referred to, and that if the statutable power be legally executed, a Court of Justice cannot change or modify its terms upon any principle of expediency or convenience. The order of the 25th of February 1841, first recites the statutes under which the Lord Lieutenant and Privy Council of Ireland are empowered to act. Secondly, it recites the vacancy of the dignity. Thirdly, it recites that the corps of the treasurership in question consists of the rectory of St. Patrick's, having with it a perpetual curacy called St. Patrick's, and the rectory of Cahervalla and Emly Grenan, *with cure of souls* ; the said several parishes or rectories constituting the union of St. Patrick. Fourthly, it then recites that the revenues of said parishes or rectories respectively consist of the tithe rent-charges therein stated ; and it adds, that there is a further income belonging to the said treasurership, arising from demised lands, amounting to the yearly sum of £80. 6s. 1½d.

Now, we know from the special verdict, that this £80. 6s. 1½d. is composed of £55. 7s. 8½d., the rent reserved upon the glebe lands of Emly Grenan, by the lease of 1835 ; £25, the rent reserved by another lease of the glebe lands of St. Patrick's, and a rent also of £2 Irish, issuing from the treasurer's garden, making £80. 6s. 1½d., British. After these recitals, the order then proceeds to "order and direct that the said parish or rectory "of St. Patrick's, together with the rectorial tithes thereunto belonging, be, and the same are thereby disappropriated, disunited, and "divested from and out of the treasurership, and united to the said perpetual curacy of St. Patrick's ;" and then the order proceeds to direct that the said parishes or rectories of Cahervalla and Emly Grenan, and the rectorial tithes thereunto belonging, be, and the same are thereby disappropriated, disunited, and divested from and out of the said treasurership, and transferred to the Ecclesiastical Commissioners.

Now, first, it is to be observed, that these recitals pointedly distinguish

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between the rectory or parish, and the revenues thereof. The word "rectory," throughout the recitals, is plainly used in its ordinary and proper acceptation, and as applied to the rectory of Cahervalla, even in the granting part, it can have no other meaning. Can we then, in the operative part of the instrument, understand it to be used in a different sense, and to mean, as the petitioner must contend it does, the rectory, except the glebe? How can the divesting of the rectory of St. Patrick, *together* with the rectorial tithes, be understood to mean the divesting of the rectory, *except the glebe*? yet this is what is contended for. It is the rectory which is disappropriated—it is the rectory which is vested in the vicar: but it is said, why are the words "together with the rectorial tithes" added? To which, by way of answer, I would ask, where is the conveyance without many redundant words? These words, "together with the rectorial tithes," are certainly redundant. They add nothing to the effect of the order. But the argument for the lessor of the plaintiff is, that the addition of the tithes amounts to a subtraction of the glebe: a construction quite too strong for me to adopt. If the Privy Council intended to reserve the glebe to the dignity, surely they might have so recited. If they intended only to disappropriate the tithes, they might have so said. If they intended to disappropriate the rectory, and yet endow the treasurership with the glebe, such an intention might have been expressed. But no; neither is the glebe excepted, nor is there any recital or indication of any intention to except the glebe, or to benefit the treasurer. The rectory, *quâ* rectory, is disappropriated; and there is not a word of reservation for the treasurer.

But it is argued, that it was not the intention of the Council to take away the glebe from the treasurer; they left his office existing; and we should rather presume they did not mean to leave it without a provision. It may be true that they did not intend to take away the demised rents, but it is clear that they intended to pass the entire rectories. And first, I may observe, that they could not take away or suspend the office of treasurer; they did deprive him of the rectories, and of the cure of souls within the parish of Emly Grenan; but they could not suspend a dignity to which was appropriated a parish, in which the dignitary had cure of souls. But I observe, secondly, no intention is expressed to separate the glebes from the rectories; and this is admitted. It is, however, argued that such intention is to be collected or implied from the words of the order. It is relied upon, first, that the rents of the glebe lands are not in the order recited as part of the revenues of the rectories, but as a further income belonging to the treasurership: secondly, that this further income is not in terms disappropriated, nor any intention shown to disappropriate it. It certainly would appear upon the face of the order, that "the further income" was not considered to be any part of the revenues of the

rectories, but was supposed to be a distinct portion of the corps of the dignity; in fact, it would seem that the Council was not aware that the lands out of which the further income issued, were the glebe lands of the rectories. But, suppose this to be ambiguous, the Council (I should say) either did know, or did not know, that the demised lands were (except the treasurer's garden) glebe lands belonging to the rectories to be disappropriated. If they did know this fact, they must have known, that in disappropriating the rectories, the glebes belonging to the rectories passed with them. And if they did not know (as it would appear by the order they did not), that the demised lands were glebe lands, but supposed them to be no part of the rectories, but other and distinct parts of the corps of the treasurer's office,—then it is clear that in the order they used the word "rectory" in its full and proper acceptation, intending the rectory, with all its incidents, to pass, and leaving those parts of the corps of the dignity (over which they supposed they had no power) untouched. But if they supposed the "demised lands" not to be glebe lands, and purposely did not name them in the disappropriating clause of the order, can any one assume to say, that had they known them to be the glebe lands of the rectories, they would, in preference to giving the glebe to the new rectors, have separated them from the rectories, and given them to the non-resident dignitary, having no cure within the parishes, and thus take them from the resident and working minister? It is, I think, rather to be collected, that the demised lands from which the further income arose to the treasurer, are not mentioned in the divesting clause, because the Council did not suppose them to be the glebes of the rectories to be disappropriated, and therefore they thought they had no power over them; and that they have omitted any express mention of them, not because they would not disappropriate them from the dignity, but because they thought they could not take them away from the treasurer's office. The distinction is clearly drawn in the order between the rectories and the revenues of the rectories. The intention is clearly to disappropriate the rectories. The rectories mayhap contain greater revenues than the Council supposed they did, but that cannot affect the operation of the instrument, if the instrument has passed, and intended to pass the rectories. I should, therefore, say that there is no intention shown on the face of this order, to disunite the glebes from the rectories; but, on the contrary, that the intention was to disappropriate the rectories with all their members and incidents.

This interpretation is that which appears to me to be the only one which is consistent with the statutable provisions on the subject; for I do not think that it is in the power of the Ecclesiastical Commissioners to disappropriate from a dignity, a part or portion of an appropriated rectory. Before, and at the time of the passing of the earliest of these statutes, many dignitaries had rectories appropriated to their dignities—some with,

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some without, cure of souls: some had not rectories, but the rectorial tithes of a parish, or a portion of them, or portions of tithes in different parishes; or a glebe, or part of a glebe, in a parish not appropriated, as the corps or part of the corps of their dignity. All these were appropriations, and the portions of tithes, or parts of glebes, were in themselves entireties as appropriated to the dignities. Upon this state of things, the Act of the 3 & 4 W. 4, c. 37, s. 124, was meant to operate; and this appears also from the preamble to that 124th section.—[Here his Lordship read the preamble.]—This clause enabled the Lord Lieutenant and Council, in certain cases, to disappropriate and disunite such benefices or revenues as had been thereto appropriated from the dignity, and therewith to endow a perpetual curate or vicar within the parish. The enactment was confined to cases in which there was a vicar or perpetual curate within the parish: and to me it appears, that upon the true construction of this enactment, the Privy Council had not given to them the power to split a rectory into portions, and leave part with the dignitary, and give a part to the vicar. The recital of the 124th section gives us the key to open the interpretation of the clause itself.—The things which are appropriated, “the same” are to be disappropriated. In the enacting clause, the words “part or parts thereof” plainly refer to the last antecedent “glebes,” as “portions” refers expressly to tithes; but it does violence to the sense, as well as to the grammar, to refer either “portions” or “parts” to the word rectories. I do not mean to say that where more rectories than one belong to a dignity, the clause may not allow the taking of some, and leaving of other rectories; but I think the statute does not allow the splitting of a rectory, or of any thing which, having been appropriated, may become the subject of disappropriation.

The second Act is the 4 & 5 W. 4, c. 90, amending the former Act: and the 7th section of this Act is relied upon as a clear declaration of the power to split a rectory; but to me it appears not to go one jot beyond the former statute. The 5th section recites that the former enactment was limited to cases in which there are vicars or perpetual curates discharging the duties, &c.; and it extends the enactment to cases in which there shall not be any vicar or curate “in any parish which, or “the tithes, or any portions of the tithes or glebes whereof, are appropriated.” And it gives to the Privy Council the power to disappropriate (in the proper cases) “any such parish, and all tithes, portions of tithes, or glebes thereunto belonging,” and annex such parish, tithes, &c., to a neighbouring rectory, or erect it into a distinct benefice. The 7th section of this statute (4 & 5 W. 4 c. 90) is that chiefly relied on by the plaintiff’s Counsel; but it is quite consistent with the enactments previously made, and does not authorise the splitting of a rectory. It enacts, that when the Lord Lieutenant and Council, under the former Act, or

this Act (*i. e.* the 5th section of this Act), shall think fit to disappropriate any rectory, vicarage, tithes, or portions of tithes, and glebes, or part or parts thereof, from and out of any dignity, &c., they may unite to any neighbouring rectory "such rectory, vicarage, tithes, or glebes, or any part, or parts, or portions thereof respectively" which shall have been disappropriated, &c. Now, the first enumeration is plainly an enumeration of the various subjects of previous appropriation to a dignity; "any rectory, vicarage, tithes, &c.," referring to this, that either the whole rectory or vicarage, or the tithes of a parish, or a portion of tithes, or a part or parts of the glebe of a parish, or of different parishes, might have been appropriated to a dignity; and in any such case, the power is given to disappropriate what had been so appropriated, whether the subject-matter was a whole rectory, or the tithes of a parish, or a portion of tithes, or a glebe, or a part or parts of a glebe; and the latter part of the clause carries the enactment no further. The thing to be annexed is the same that was disappropriated, and the words "or any part or parts, or portions thereof respectively" (so much relied on) seem to me to point expressly to the portions of tithes, or parts of glebes before enumerated, as what had been of old appropriated to the dignity, and what was now to be disappropriated and united to the neighbouring benefice; and the word "respectively" must be confined to the tithes and glebes where portions and parts are before mentioned (the word "portions" being applicable to the tithes, and the word "parts" to the glebes), and not to a rectory, to which the word portion or part is never applied, in any of the enumerations of this or the succeeding statutes. Tithes, or glebes, are not properly portions or parts of a rectory; they form the revenues of a rectory. If a rectory were portioned, each part of it would be a rectory.

I may here notice the 1st section of this statute (4 & 5 W. 4, c. 90), which gives the Lord Lieutenant and Council, in certain cases, power to suspend the appointment of ecclesiastical dignitaries. The non-suspension of the treasurership of Limerick has in this case been used as an argument to show, that the Council intended to keep up the office, and therefore thought it right to give it a maintenance. But the enactment applies only to cases in which the dignitary has no cure of souls within the appropriated parish, whereas the special verdict tells us, that in Emly Grenan the treasurer had the cure of souls. The Council, therefore, had no power to suspend this dignitary; and by disappropriation of the rectory, the cure of souls was taken from the treasurer: the Council left him the office, because they could not take it from him: and it is not the principle of this Act to detach parochial revenue from parochial duty, or to provide for sinecurists at the expense of the working clergy.

But the 6 & 7 W. 4, c. 99, throws further light upon this question. The 27th section of that statute recapitulates the enactments of the two

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former statutes, and gives thus an exposition of their substantial effect.— [Here his Lordship read the section.]—And the 28th section, which is the enactment under which the Ecclesiastical Commissioners are entitled to take, is express to the same purpose; “portion” is here only applicable to tithes, and “part or parts” only to lands. The 3 & 4 Vic. c. 101, is all to the same effect. The 5th section recites in terms, and repeals, the 5th section of the 4 & 5 W. 4, c. 90; the 6th section empowers the Lord Lieutenant, in lieu of uniting to a neighbouring rectory, any parish, tithes, or portion of tithes or glebe so disunited, either to create the same into a separate parish, or to transfer them to the Ecclesiastical Commissioners. To the 7th section, the same observations apply. And if I have truly construed these statutes, the argument in favour of the defendant’s title is powerfully reinforced, for we cannot presume that it was the intention of the Lord Lieutenant and Council to do that which the statutes giving them their powers did not enable them to do. We cannot presume, therefore, that they intended to sever the glebe in this instance from the rectory.

The case of *Moseley v. Motteux*, cited by my Lord Chief Baron during the argument, so far from being an authority in support of the plaintiff’s argument, seems to me, so far as it is applicable at all, to cut the other way. I dwell not here on the distinction between the case of a manor to which an advowson may or may not be appendant, and from which it is always severable (when appendant) at the will of the owner, and the case of a rectory with glebe attached to it, and from which the glebe can be severed only by Act of Parliament. But in *Moseley v. Motteux*, although the advowson was appendant to the manor, yet the word “manor,” as used in the recovery deed, was held to pass the manor without the advowson appendant. Why? Because the clear and plainly expressed meaning of the parties to the deed was, that they used the word “manor” in that restricted sense, being under the mistaken opinion that the advowson was an advowson in gross, and not appendant to the manor; and so here, if it clearly appeared on the face of the order, that the Council used the word rectory to mean, rectory except the glebe, there might be a foundation for the plaintiff’s argument. But in this case, the intention is the other way. It may be collected from the order, that the Council intended to disappropriate the entire rectories (they do so in terms), and that they intended to leave the £80. Os. 6½d. rents to the treasurer, supposing them not to belong to the rectories, and that they could not take them away. But whatever was their intention about the “further income,” it is manifest that the Council used, and meant to use, the word “rectory” in its full and ordinary acceptation. As before intimated, they were probably mistaken in supposing the glebe to be no part of the revenues of the parish; but that mistake cannot warrant us in restricting the word “rectory,” and using it in a sense inconsistent with its ordinary signifi-

cation, and also with the use made of it by the Council. And on this subject, the case of *Moseley v. Motteux* supplies us with a principle directly applicable,—which is this, that the intention of the parties apparent on the face of the instrument is to have effect, even though that intention be founded on a mistake. If, therefore, the Council have made a mistake, and supposing the demised lands to be no part of the revenues of the rectory, intended to disappropriate the rectory, that intention, even if the result of mistake, must be effectuated.

On these grounds, I am of opinion that this judgment should be reversed, and judgment given for the defendant below.

TORRENS, J.

In the progress of the discussion which this case has already undergone, I came to the conclusion, that, concurring as I do fully with the opinions of the majority of my learned Brethren, that the judgment of the Court below should be affirmed,—I should have best consulted the convenience of the Court, and the interests of the public, by simply expressing that concurrence. But I now feel, that after the full, able, and elaborate judgment, which has just been delivered by my Brother Crampton, it would be unbecoming in me to pass over the reasonings on which he has grounded the conclusion at which he has arrived, without stating some of the reasons, shortly, which have led me to a different conclusion; remaining, as I do, unconvinced by the argument of my learned Brother.

Two questions for our determination arise on this record. The first is, whether the Lord Lieutenant and the Privy Council had jurisdiction, or rather the authority, to make the order which they have made in this case? and the second question is, whether, under that order, the glebe lands, which are the subject of this action, remained with the treasurer of the diocese of Limerick, or passed by it to the Ecclesiastical Commissioners?

With respect to the first of these questions, I have to observe, that a reference to the language of the 3 & 4 *W. 4*, c. 37, s. 124, confirmed by that of the 7th section of the 4 & 5 *W. 4*, c. 90, has led me to the conclusion, that the Lord Lieutenant and the Council had authority to make an order disappropriating part of the rectory from the treasurership, and vesting such part in the Ecclesiastical Commissioners. And I am the more confirmed in this opinion, because in following my Brother Crampton through the various statutes on which he has commented, I find, on referring to the last of them—viz., the 3 & 4 *Vic.* c. 101, s. 6, that the same precise words have been used by the Legislature, which were used by them in the first of these statutes—viz., the 3 & 4 *W. 4*, c. 37, s. 124; showing, in my mind, that whatever difficulty may have been raised by the language of the intervening statutes, as indicating a different intention on the part of the Legislature, yet that they had come back to their original inten-

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tions, by making use of the same expressions in the last enactment on the subject, which had been used by them in the first. I have, therefore, come to the same conclusion on this point as the majority of my Brethren, viz., that the authority to make a partial disappropriation of a rectory is vested in the Lord Lieutenant and the Council.

As to the other question for our consideration, into which we are to inquire, are we bound in a Court of Law to give to the word "rectory," as used in this order in Council, its strict, stringent, technical meaning? And with respect to this, I am of opinion, that looking at the Acts of Parliament under which the framers of this order were acting, we are at liberty to construe that term liberally, without giving to it, what I admit to be its legal acceptance, and precise legal meaning. I confess that I entertained, at the first, great and serious doubts on this point; but on full consideration, I am disposed to rest my judgment on this ground, that the word "rectory," taking into account the object and intention of the Council—apparent, in my opinion, on the order itself,—was not used by them in that strict legal acceptance which is the true and definite meaning of the term; but must be construed, and controlled, by the other parts of the instrument; and even if it were a case of construction of a deed *inter partes*, I should hold that the terms of the order are sufficient to separate the glebe lands from the rectory, and to leave them in the hands of the person who filled the office of treasurer: and on this point, I consider the case of *Moseley v. Motteux*, referred to by my Lord Chief Baron, as strongly supporting this view of the case. It is true, that I am not bound to go that length; nevertheless that is my opinion, which I am aware is not acquiesced in by several of my Brethren, with whom, on the other parts of the case, I have the good fortune to concur. The policy of the statutes were manifestly, as the preambles show, to provide for the exigencies of the church, and for the remuneration of the working clergy, according to the duties they had to perform; and the Order in Council evidently contemplates three distinct parties as the objects of its operation, and within the view of its policy; first, the dignitary, with duties to perform, but with an income beyond what was necessary for the performance of those duties; secondly, the perpetual curate, under-paid for the duties which devolved upon him to perform; and thirdly, the Ecclesiastical Commissioners, a public body, established for public purposes, which required funds to carry on its various duties, and to meet a large expenditure. Such being the parties in the contemplation of the Lord Lieutenant and Council, when making this order, the first provision of the order is, that the parish or rectory of Saint Patrick's, together with the rectorial tithes thereunto belonging, should be disappropriated and disunited from the said trusteeship, and united to the said perpetual curacy of St. Patrick's, with the object of providing for and remunerating the under-paid perpetual curate, who had to perform

the several duties attached to the cure of souls. In the next place, they give to the Ecclesiastical Commissioners the rectories of Cahervalla and Emly Grenan, with the RECTORIAL TITHES thereunto belonging—(no unimportant words in my opinion.) And as to the third party—viz., the treasurer, they leave with him that income which they state to have arisen from demised lands, making it no part of what may be called the *granting part* of the order in question, nor using any words divesting him of that estate which it is confessed he had in those lands previous to the issuing of the order; thus carrying out the policy of the Acts, by providing a remuneration for the performance of all the ecclesiastical duties, whether cathedral, or connected with the cure of souls.

It is said, that the Council knew nothing respecting the circumstance of these "*demised lands*" being glebe lands; but, as it appears to me, they must now be held to have had a perfect and accurate knowledge of what these demised lands were comprised, from what appears on the face of the order they have made. They find "that there is a *FURTHER INCOME* belonging to the said treasurer'ship, arising FROM *DEMISED LANDS*, amounting to the yearly sum of £80. 6s. 1½d." How came the Council to know that the lands from whence this income arose, were *demised lands*? To arrive at the knowledge of that fact, they must have had before them the same facts as those which appear on the special verdict—viz., that they were "the glebe lands of Emly Grenan." For if they were demised, how did they find out that they were demised, except from the same facts as those on which the Jury found their special verdict? I might also add, that it is not to be presumed that the Council did not fully investigate the nature and title of that property, parts of which they were granting to others for the first time, and not divesting another party of that which before he had legally possessed.

My Brother Crampton has observed, in corroboration of his argument, that the Council could not have abolished the dignity, by reason of its having been an office "with a cure of souls" connected with it. That fact, however, as it strikes me, is a strong argument to show that it was the intention of the Council to leave the demised lands with the office, inasmuch as the dignitary having duties to perform, it would be carrying out the policy of the statutes more faithfully to leave him some remuneration for them.

For these reasons, I am of opinion, that the judgment of the Court below should be affirmed.

PENNEFATHER, B.

It appears to me, that the single question for our decision in this case, is as to the true and right construction of the Order in Council; the other point on the construction of the Acts of Parliament being, in my mind, merely ancillary to the right determination of that question. It

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is proper, however, with the view of assisting in this construction of the Order in Council, that some consideration should be given to the bearing and construction of those Acts of Parliament; but as they have received a full consideration already, and as my opinion is mainly founded on the construction of the instrument itself, I shall at once proceed to that part of the question.

In my judgment, this instrument is not to be construed as if it were a deed *inter partes*; but as the execution of a trust vested by the Legislature in the Lord Lieutenant and the Privy Council, and to receive a consideration in some degree similar to that which is given to grants from the Crown; so that if the Lord Lieutenant and Council have mistaken their powers, the act which has been done by them may, perhaps, be a nullity; but that it can never be taken to have divested any interest which they had not an intention of divesting. It appears that the treasurership of Limerick was possessed of and entitled to several beneficial interests in rent-charges and rents; but whether the treasurer was so entitled as rector of a parish or parishes, or in any other way, does not appear either from the Order in Council or from the special verdict. It may have been as rector, or it may not, but entitled he was; and the Order in Council expressly recites the different matters of which the corps of the treasurership was composed. And here I would protest against the argument founded on the supposition that the deliberate Order of the Council was made under a mistake. There was no ground for a mistake; and I am not at liberty to say that they were mistaken. But to return; the order expressly recites the particulars of which the corps of the treasurership was composed, viz: First, the rectory of St. Patrick's, rent-charge, £256. 3s.; second, the rectory of Cahervalla, rent-charge £157. 10s.; and third, the rectory of Emly Grenan, rent-charge £112. 10s. These are the matters which the order states the corps of the treasurership to be composed of. And here the order explains what was considered to be the "rectory," and of what it was composed. The order then, after this statement, further says in these words—"There is a further income belonging to the said treasurership arising from demised lands amounting to the yearly sum of £80. 6s. 1½d.," that is to say, there is an income from demised lands, further, that is, other, different from that heretofore called the "rectory." We call the rectory of St. Patrick and the rent-charge £256. 3s.; the rectory of Cahervalla and the rent-charge £157. 10s.; and the rectory of Emly Grenan and the rent-charge £112. 10s.; and besides *these rectories*, the treasurership is entitled to an annual rent of £80. 6s. 1½d. arising out of demised lands. How do they know that this rent was out of demised lands? By the information which they received, and that information it must be presumed was correct. If so, they must have known that the rents were received out of glebe lands, and which they must have considered as

distinct from that which they treat as the rectory. They had been demised, and constitute an income separate and independent from the rectory; and, therefore, it would appear to me, on the face of this document, that the Council did not consider that the glebe lands were included in what they treat as the rectory.

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They then proceed to grant what they have thus defined to be the rectory of St. Patrick's, and the rectorial tithes thereto belonging, to one person; and the rectories of Cahervalla and Emly Grenan, with their rectorial tithes, to the Ecclesiastical Commissioners; and the Ecclesiastical Commissioners must take that alone which it was intended by the Lord Lieutenant and the Council they should take under the term "rectory." They will take every thing not expressly excepted. But where it is enumerated that the rectory was composed of tithes or rent-charge, and that there was additional income from demised lands, there is, in my mind, a clear exception of the latter, and the rents shall not pass. I will go the length of saying, that if there is not a clear intention on the face of the order to except these rents out of the rectory, that the word "rectory" ought to have its natural meaning and include the glebe lands.

It has been said, that a grant of a rectory with an express exception of the glebe, is void as to the exception; perhaps this may be so as to a deed between subject and subject; we are not, however, called on to determine this, for the order with which we are dealing is not, as it strikes me, to be construed as such a deed, but rather as if it were a grant from the Crown, which cannot be held to extend to any thing not clearly meant to pass by it. If the Lord Lieutenant and Council have been under a mistake, it is not for me to say what is the consequence thereof; but this I will say, that these rents and lands cannot pass to the Ecclesiastical Commissioners contrary to that which was intended by the order. If we look at the instrument itself, without reference to the special verdict, there can be no question on the subject. It could not, for a moment, be contended that it was not the intention of the Council to leave these rents with the treasurer; and then the special verdict, on which alone any question arises, informs us that they arise from glebe lands. That fact must have been before the Council, and therefore, it must be taken, as I apprehend, that they intended to leave these rents, and the property out of which they issued, with the treasurer.

My Brother Crampton has observed, that the Lord Lieutenant and Council had no jurisdiction to abolish this office, because it was a dignity with a cure of souls; *à fortiori*, therefore, I would say, that it was incumbent on them to have left a provision for the person holding the office; for having duties to perform, he ought not surely to have been left *inops pecuniæ*.

It certainly is of importance to consider, whether under the provisions

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of the Acts of Parliament which have been discussed, the Lord Lieutenant and Council had a right to separate from the rectory a portion of it ; as we ought to be slow to say that they made any order not warranted by the trust they were about to execute. I do not mean to go through the several Acts, as they have been fully reviewed and commented on by my Brethren who have preceded me ; but I would invite attention to one clause which was much relied on by my Brother Jackson, and was afterwards commented on by my Brother Crampton. The clause to which I allude is the 7th section of 4 & 5 W. 4, c. 90. It is in these words, "That it shall and may be lawful for such Lord Lieutenant, or other Chief Governor, or Governors, and Council, if they shall so think fit, to unite and annex to any adjoining or neighbouring rectory, vicarage, or perpetual curacy as aforesaid, such rectory, vicarage, tithes or glebes, or any part or parts, or portions thereof *respectively*, which shall have been so disappropriated, disunited, or divested, as aforesaid, together with the actual cure of souls within such rectory or vicarage, or such part or parts thereof as shall be so united or annexed respectively, or within such place or places respectively, whereof the tithes or glebes shall be so united and annexed." These words appear to me plainly to recognise a division of a rectory or vicarage, as well as of tithes and glebes. I am, therefore, disposed to think, although I do not feel positive on the subject, that the Council were by statute authorised to appropriate a portion of a rectory ; but as my judgment is founded merely on the construction of the Order in Council, that it cannot be construed to take away from the treasurer any thing that was not expressly intended, I need not do more than state my impression as to the true construction of the Acts of Parliament.

I am, therefore, of opinion, that the judgment of the Court below ought to be affirmed.

BURTON, J.

I do not think it necessary for me, after the opinions which have been delivered by the different members of the Court, and according as I do in every particular with the judgment delivered by my Brother Jackson, to take up the time of the Court by a full discussion of the questions which have been raised for our consideration. I shall, therefore, state very shortly the grounds on which I concur in the judgment of the majority of the Court.

The first question appears to me to be as to the true intent and meaning of the order made by the Lord Lieutenant and Council, that is to say, what it is we are to collect from that order, as having been their intention with reference to the matters now brought before us. And with respect to this case, I have only to state that my mind cannot entertain a doubt as to their having intended to vest the rectorial tithes alone in the Ecclesiastical

Commissioners, and to leave the rents arising from glebe lands with the treasurer ; and I would further add, that if I thought that such was not their intention, I should be of opinion, that their intention was deficient in justice and in reason. Being of that opinion, I might be disposed to say no more on the subject. But it is certainly right to consider, whether the terms in which this order has been expressed, are a sufficient declaration or indication of the intention of the makers of it, so as to warrant us in carrying what we believe to have been the true intention of the order into effect, that is to say, do the terms necessarily imply, or at least leave it doubtful upon a legal construction of them, whether a different meaning may not be ascribed to them? In my mind they are sufficiently explicit to warrant the construction put upon them by the majority of the Court ; and in coming to this conclusion, it is not necessary for me to say what might be the construction of the terms used in this instrument, if used in a grant or legal conveyance *inter partes* ; or if the language of it were used in a will, or in a power conferred on a private individual by a deed. My impression, however, being that if this instrument had been the execution of such a power, I should be disposed to come to the same conclusion ; but I have no manner of doubt on the subject, when I take into consideration the nature of the instrument in question ; that it is not one of a private nature ; not the execution of an authority entrusted to an individual in his private capacity over property ; but is an act done in the exercise of an authority vested in a public body, for public purposes, and whose purpose and object we must take it to have been, the doing what was right and proper to effectuate, in matters so brought within what may be called their jurisdiction. Taking this view of the matter, I think myself not only authorised, but bound, to look at, and construe the terms of this order in a liberal sense ; and if I find the intention of the framers of it to be conformable to justice and propriety, in effecting a public benefit, and without a tendency to any thing unfair or inequitable, I feel no difficulty in coming to, and expressing my opinion, that the terms used are, technically speaking, sufficient to carry the intention, of which I entertain no doubt, into effect.

All that remains for me to express an opinion upon, is the construction of the Acts of Parliament, which have been abundantly discussed on both sides ; and with respect to that, I own that I have felt some degree of doubt. Certainly I was much impressed with the view taken by my Brother Crampton of the purport and meaning of those Acts of Parliament, and with the observations made by him on the subject, both in this Court, and in consultation among ourselves ; but I can only say, that after the best consideration I have been able to give to the enactments referred to, I am of opinion, that, taking all the provisions of them together, the order of the Lord Lieutenant and Privy Council is warranted by the powers vested in them by the Legislature. And I may

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add, that I was led to this conclusion, in some measure, by the consideration, that, in my judgment, the powers vested in them would not have been nearly so beneficial to the public by a different construction of the statutes.

Upon the whole, I am of opinion that the judgment of the Court below should be affirmed.

BRADY, C. B.

In this case, two questions have been raised for our consideration and decision. The first of these questions is as to the construction of the Acts of Parliament; as to whether the Lord Lieutenant and Council are thereby empowered to take a part of the revenues of a rectory, and to transfer such part to the Ecclesiastical Commissioners, leaving the residue with the dignitary with whose property they are dealing. In my judgment, there can be no doubt but that the Lord Lieutenant and Privy Council had such a power under the statutes; at all events, they had full power given to them to do what they have done in this instance.

Without going through all the Acts of Parliament on the subject, I may observe, that I was struck with the language of the 7th section of the 4 & 5 W. 4, c. 99, which, in my mind, relieves this case from much of the difficulty that has been suggested; because in that section it appears, that the Legislature, in dealing with them, speaks of a rectory or vicarage as divisible. It provides, that in case the Lord Lieutenant and the Council disappropriate any rectory, vicarage, &c., they may, if they so think fit, "unite and annex to any adjoining or neighbouring rectory, vicarage, or perpetual curacy as aforesaid, such rectory, vicarage, tithes or glebes, or any part or parts, or portions thereof *respectively*, which shall have been so disappropriated as aforesaid." On these words, it has been argued, that if the entire rectory, or vicarage, were disappropriated under statutable powers conferred on the Lord Lieutenant and the Council, such entire rectory or vicarage might be united or annexed to an adjoining rectory, vicarage, or perpetual curacy; but that they had no jurisdiction to divest a part of the same, and annex it to such neighbouring rectory, vicarage, or perpetual curacy. But the Act goes on to say, "together with the actual cure of souls within such rectory or vicarage, or such *part or parts thereof* as shall be so united or annexed respectively"—parts of what? Why, parts of the rectory or vicarage; obviously implying a power of division by the Lord Lieutenant and Council. Again, the same power is implied by the provisions of the 6 & 7 W. 4, c. 99, s. 28, which recites the difficulties of annexing to an adjoining rectory, vicarage, or curacy, any disappropriated rectory, vicarage, tithes, portions of tithes, or lands, or part or parts thereof, by reason of the existence of leases of such tithes or lands, being sometimes included in one and the same demise, and sometimes situate in, or arising out of, several parishes; and

enacts, that it shall be lawful "to order such rectory, vicarage, tithes, "portions of tithes, or lands, or part or parts thereof, to be transferred to "the Ecclesiastical Commissioners;" showing the intention of the Legislature, that the Lord Lieutenant and the Council should have the power to give the glebe to one, and the tithes to another. These two statutable provisions conclude, in my judgment, that a power of division was vested in the Lord Lieutenant and Council.

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As to the other question for our consideration—it appears to me, that the true view to be taken of the act of the Council is, that it is an act done in the execution of a power vested in them. If it were to be considered as if it were a deed *inter partes*, the principle "*ut res magis valeat*," and to carry out the intention of the framers of it, would, in my mind, be sufficient to induce us to give it the construction I put upon it; but I do not regard it as a deed, but merely, as I before observed, as an act done in the exercise of a power, and as such, to be construed on the principle, that what is done under a power is to be considered as if it were done in and by the instrument creating the power. Reading this act of Council, therefore, as if it were incorporated in the Act of Parliament itself, I may look at, and read it, according to the intention of the Legislature, and in a liberal and enlarged view of its terms.

I may add, that if this instrument is to be construed as if it were a deed, the case of *Moseley v. Motteux* affords a principle on which the construction for which I am contending ought to be given to it. The parties in that case intended to pass a manor, and used words sufficient to include all belonging to it, yet because an intention, through a mistaken notion of their title, appeared on the face of the deed, that a moiety only of an advowson which was appendant to it should pass, the Court held, that the word "manor" was to be taken in a restricted sense only, and not to include all that the natural and legal meaning of the term included. So here the Council either knew, or they did not know, that these demised lands belonged to the rectory in question. If they were aware of that fact, they did not intend that they should be given, and therefore they did not pass to the Ecclesiastical Commissioners; and if they were not aware of that fact, it is equally clear that they could have had no such intention, and the same consequence follows; and therefore, in either point of view, these lands did not pass by the Order in Council. The word "rectory" was manifestly used in a limited sense, or the words "rectorial tithes" would not have been added; and I have, therefore, no difficulty in arriving at the conclusion that the judgment of the Court below should be affirmed.

DOHERTY, C. J.

I concur in opinion with the majority of my Brethren, that the judgment of the Court below should be affirmed; and I am glad that the

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greater number of the Judges who have delivered their opinions, have agreed in giving a construction to these Acts of Parliament which will have the effect of continuing in the Lord Lieutenant and Privy Council a power to distribute the ecclesiastical property which they have to deal with, in such proportions as they may consider most beneficial. It is of great importance to the public that there should be a decision with respect to the power of the Lord Lieutenant and Privy Council. If they did not possess the power of distribution which they have exercised in this case, they could not, in my judgment, carry out the object of these enactments, in making a just, prudent, and wisely proportioned distribution between the parties, for whom they are bound adequately to provide; and therefore, with a view to future cases which may arise, it is satisfactory that the opinion of so large a majority of the Bench has been pronounced on this point, and that the powers of the Lord Lieutenant and Privy Council cannot in future be crippled by our holding that they have been hitherto in error, where they have, in the exercise of their jurisdiction under these statutes, assumed that they were empowered to divide glebe lands from rectories.

On the second point, I may observe, that I do not regard the instrument under consideration as an ordinary conveyance. I consider this order as the creature of these Acts of Parliament, and the meaning and intention of the framers of it is to take effect, even though, in construing it, we are obliged to give to words a meaning different from their ordinary common law signification. I do not think we are warranted in saying that the Lord Lieutenant and Privy Council were mistaken or uninformed as to the facts when they made this order; on the contrary, the words of the instrument itself show that they were fully informed on the subject, that it was framed on mature consideration, and the distribution which they have made (according to the construction given to their order by the Court below) has not been arraigned by any person as not being the wisest, the most discreet, and the most just that could have been made; and being such, I should have deeply regretted, if by giving a technical meaning to some of its words, we should defeat what appears to me from reading the order, and from adverting to all the facts and circumstances, obviously to have been the intention of the Lord Lieutenant and Privy Council. There is no dispute about the legal import of the word "rectory;"—that is conceded; but I think the legal and technical meaning of that word is not to prevail against the manifest intention of the framers of this order.

For these reasons, I am of opinion that the judgment of the Court of Exchequer should be affirmed; and the judgment of the Court is that it be affirmed with reasonable costs.

Judgment affirmed.

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v.

DANIEL O'CONNELL, JOHN O'CONNELL, RICHARD
BARRETT, THOMAS M. RAY, JOHN GRAY, THOMAS
STEELE, CHARLES G. DUFFY, and THOMAS TIERNEY.

(*Queen's Bench.*)

April 25 to
May 6.
Trinity Term.
May 24.

CONSPIRACY.—In this case the defendants had been indicted for a conspiracy, and convicted on a trial at bar in last Hilary Term.*

This Court will entertain a motion for a new trial in a misdemeanor case after a trial at bar.

Where on such motion made on behalf of a traverser it appeared that the name of one of the Jurors was J. J. R., but on the jurors' book and on the jury panel, the name was J. B., and by that name the Juror answered and was sworn, without any objection being made by the traversers' Counsel; *Held*, that this was no ground of mistrial.

Slight evidence of venue is sufficient in such case.

Where after issue joined on such indictment a *venire* was awarded returnable in H. T., and on the issue so joined a trial at bar was fixed for a certain day in that Term; and it was ordered that in case the trial so fixed should not terminate on or before the last day of that Term, then that every succeeding day (if necessary) until the following Term should be appointed for the continuation of the trial, and that the days so fixed should, for the purpose of such trial, be taken to be part of such Term; *Held*, that this order was within the scope of the statute 1 & 2 W. 4, c. 31, and that the trial was properly continued in Vacation (a).

On such trial the Jury having been allowed to separate each day at the adjournment of the Court; *Held*, that this was no ground of mistrial.

Under the provisions of 3 & 4 W. 4, c. 91, it is the duty of the Recorder of Dublin annually to revise the lists of Jurors of the county of that city, and to cause a general list of Jurors to be made out, and delivered over to the Clerk of the Peace of the said city for the purposes of the ensuing year. On motion for a new trial, on the grounds that these general jury lists from which were framed the jurors' book and the special jury list, were fraudulently dealt with, for the purpose of prejudicing the traversers in their defence; *Held*, that this was not a proper ground for a motion for a new trial.

Where an indictment charged a conspiracy to cause the Queen's subjects to meet in unlawful and seditious assemblies, and thereby to intimidate the Government, and one of the overt acts laid in the indictment was a meeting at M.; *Held*, that a ballad publicly hawked about and sold at such meeting was evidence against the parties charged with the conspiracy as part of the *res gestæ*, and showing the character of the meeting, although the traversers may have been individually ignorant of its contents.

The expression by a Judge of his opinion as to the facts of the case, without submitting them exclusively to the Jury, is no ground for setting aside a verdict for misdirection, such being a matter resting with the discretion of the Judge.

The statutable proof of the publication of a newspaper is sufficient evidence not only against the proprietor, but also against any person affected by his acts.

The act of one conspirator done in pursuance of the common object, is evidence against his co-conspirators; therefore, proof of the publication of newspapers by one of the conspirators in furtherance of the common object, is admissible evidence against the rest; *sed, per* PERRIN, J., they are not evidence to be left to the Jury to establish the fact of the conspiracy.

(a) Affirmed on writ of error.

* See full Report of Trial by *Armstrong and Trevor*.

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“and say that Daniel O’Connell, of, &c., John O’Connell, Thomas Steele, “Thomas Matthew Ray, Charles Gavan Duffy, the Rev. Thomas Tierney, “Rev. Peter James Tyrrell, John Gray, and Richard Barrett; of, &c, “unlawfully, maliciously and seditiously contriving, intending and devising “to raise and create discontent and disaffection amongst the liege subjects “of our said Lady the Queen, and to excite the said liege subjects to “hatred and contempt of the Government and constitution of this realm as “by law established; and to excite hatred, jealousies and ill-will amongst “different classes of the said subjects; and to create discontent and disaf- “fection amongst divers of the said subjects, and amongst others, her “Majesty’s subjects serving in her Majesty’s army; and further contriving, “intending and devising to bring into disrepute and to diminish the confi- “dence of her Majesty’s subjects in the tribunals duly and lawfully “constituted for the administration of justice; and further, unlawfully, “maliciously and seditiously, contriving, intending and devising by means “of intimidation, and the demonstration of great physical force, to “procure and effect changes to be made in the Government, laws “and constitution of this realm, as by law established, heretofore, to wit, “on the thirteenth day of February, in the year of our Lord one “thousand eight hundred and forty-three, with force and arms, to wit, at “the parish of St. Mark, in the county of the city of Dublin, unlawfully, “maliciously and seditiously did combine, conspire, confederate and agree “with each other, and with divers other persons, whose names are to the “Jurors aforesaid unknown, to raise and create discontent and disaffection “amongst the liege subjects of our said Lady the Queen; and to excite “such subjects to hatred and contempt of the Government and constitu- “tion of this realm, as by law established; and to unlawful and seditious “opposition to the said Government and constitution; and also to stir up “jealousies, hatred and ill-will between different classes of her Majesty’s “subjects, and especially to promote amongst her Majesty’s subjects in

"Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of the United Kingdom of Great Britain and Ireland, and especially in that part of the said United Kingdom called England; and further, to excite discontent and disaffection amongst divers of her Majesty's subjects serving in her said Majesty's army; and further, to cause and procure, and aid and assist in causing and procuring divers subjects of our said Lady the Queen, unlawfully, maliciously and seditiously, to meet and assemble together in large numbers, at various times, and at different places within Ireland, for the unlawful and seditious purpose of obtaining by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes and alterations in the Government, laws and constitution of this realm, as by law established; and further, to bring into hatred and disrepute the Courts by law established in Ireland for the administration of justice, and to diminish the confidence of her said Majesty's liege subjects in Ireland, in the administration of the law therein, with the intent to induce her Majesty's subjects to withdraw the adjudication of their differences with, and claims upon each other, from the cognizance of the said Courts by law established, and to submit the same to the judgment and determination of other tribunals to be constituted and contrived for that purpose."

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The count then stated at length the various acts which were alleged as overt acts in support of the conspiracy. These were alleged to be done in order "to excite the liege subjects of our Lady the Queen, to discontent with, and hatred of, and disaffection to the Government, laws and constitution of this realm, as by law established, in contempt of our said Lady the Queen, and the laws of this realm, to the evil example of all others in the like case offending, and against the peace of our said lady the Queen, her crown and dignity."

The second count was in the same terms as the first, but the overt acts were not set out.

The third count was in the following form:—

"That the said, &c., unlawfully, maliciously and seditiously contriving, &c., to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said liege subjects to hatred and contempt of the Government and constitution of this realm as by law established; and to excite hatred, jealousies and ill-will amongst different classes of the said subjects; and to create discontent and disaffection amongst divers of the said subjects, and amongst others, her Majesty's subjects serving in her Majesty's army; and further contriving, intending and devising to bring into disrepute and to diminish the confidence of her Majesty's subjects in the tribunals duly and lawfully constituted for the administration of justice; and further unlawfully, maliciously and seditiously contriving, intending and devising by means

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“of intimidation and the demonstration of great physical force, to procure
 “and effect changes to be made in the Government, laws and constitution
 “of this realm as by law established, heretofore, to wit, on the thir-
 “teenth day of February one thousand eight hundred and forty-three,
 “with force and arms, to wit, at, &c., unlawfully, maliciously and
 “seditiously did combine, conspire, confederate and agree with each
 “other, and with divers other persons whose names are to the Jurors afore-
 “said unknown, to raise and create discontent and disaffection amongst
 “the liege subjects of the Queen; and to excite such subjects to hatred
 “and contempt of the Government and constitution of this realm as by
 “law established; and to unlawful and seditious opposition to the said
 “Government and constitution; and also to stir up hatred, jealousies and
 “ill-will between different classes of her Majesty's subjects, and especially
 “to promote amongst her Majesty's subjects in Ireland feelings of ill-will
 “and hostility towards and against her Majesty's subjects in the other parts
 “of the said United Kingdom, and especially in that part of the said
 “United Kingdom called England; and further, to excite discontent and
 “disaffection amongst divers of her Majesty's subjects serving in her said
 “Majesty's army; and further, to cause and procure, and aid and assist in
 “causing and procuring divers subjects of our said Lady the Queen, to meet
 “and assemble together in large numbers at various times, and at different
 “places within Ireland, for the unlawful and seditious purpose of obtaining
 “by means of the intimidation to be thereby caused, and by means of the
 “exhibition and demonstration of great physical force at such assemblies
 “and meetings, changes and alterations in the Government, laws and con-
 “stitution of this realm as by law established; and further, to bring into
 “hatred and disrepute the Courts by law established in Ireland for the
 “administration of justice, and to diminish the confidence of her said Ma-
 “jesty's liege subjects in Ireland in the administration of the law therein,
 “with the intent to induce her Majesty's subjects to withdraw the adjudi-
 “cation of their differences with and claims upon each other from the
 “cognizance of the said Courts by law established, and to submit the same
 “to the judgment and determination of other tribunals to be constituted
 “and contrived for that purpose, in contempt,” &c.

The fourth count was the same as the third, only omitting the charges
 as to creating discontent and disaffection among the subjects serving in
 the army, and the diminishing the confidence of the people in the tribu-
 nals established by law.

Fifth count.—“That the said, &c. unlawfully, maliciously and sedi-
 “tiously contriving, &c., to cause and create discontent and disaffection
 “amongst the liege subjects of our said Lady the Queen, and to
 “excite the said subjects to hatred and contempt of the Government
 “and constitution of this realm as by law established, heretofore to wit,
 “on, &c., at, &c., unlawfully, maliciously and seditiously did combine, con-

"spire, confederate and agree with each other and with divers other persons whose names are to the Jurors aforesaid unknown, to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said subjects to hatred and contempt of the Government and constitution of this realm as by law established, and to unlawful and seditious opposition to the said Government and constitution; and also to stir up jealousies, hatred and ill-will between different classes of her Majesty's subjects, and especially to promote amongst her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against her Majesty's subjects in the other parts of the said United Kingdom, and especially in that part of the said United Kingdom called England, in contempt," &c.

Sixth count.—"That the said, &c. unlawfully, maliciously and seditiously contriving, intending and devising, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the Government, laws and constitution of this realm as by law established, heretofore, to wit, on, &c., with force and arms, &c., to wit, at, &c., unlawfully, maliciously and seditiously did combine, conspire, confederate and agree with each other and with divers other persons whose names are to the Jurors aforesaid unknown, to cause and procure, and aid and assist in causing and procuring divers subjects of our said Lady the Queen to meet and assemble together in large numbers at various times and at different places within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes and alterations in the Government, laws and constitution of this realm as by law established, in contempt," &c.

The seventh count was the same as the sixth, with the addition of these words:—"And especially, by the means aforesaid, to bring about and accomplish a dissolution of the Legislative Union now subsisting between Great Britain and Ireland, in contempt," &c.

Eighth count.—"That the said, &c. unlawfully, maliciously and seditiously contriving, &c., to bring into disrepute and to diminish the confidence of her Majesty's subjects in the tribunals duly and lawfully constituted in Ireland for the administration of justice, on, &c., with force, &c., at, &c., unlawfully, maliciously and seditiously did combine, conspire, confederate and agree with each other and with divers other persons whose names are to the Jurors unknown, to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of Justice, and to diminish the confidence of her said Majesty's liege subjects in Ireland in the administration of the law therein, with the intent to induce her Majesty's subjects to withdraw the

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Queen's Bench. "the cognizance of the said tribunals by law established, and to submit the
 THE QUEEN "same to the judgment and determination of other tribunals to be con-
 v. "stituted and contrived for that purpose, in contempt," &c.
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The ninth count was the same as the eighth, omitting from the introductory part the words "in Ireland," after the words "duly and lawfully constituted;" and in the last part of the count, after the words "administration of the law therein," omitting the allegation as to withdrawing the adjudication of differences, and substituting the following:—"And to assume and usurp the prerogative of the Crown in the establishment of Courts for the administration of the law, in contempt," &c.

The tenth count was the same as the eighth, but did not aver the intent alleged in the eighth.

Eleventh count.—"That the said, &c., unlawfully, maliciously and seditiously contriving, &c., by means of intimidation and the demonstration of physical force, and by causing and procuring large numbers of persons to meet and assemble together in divers places, and at divers times within Ireland, and by means of seditious and inflammatory speeches and addresses to be made and delivered to the said persons so to be assembled; and also by means of the publishing, &c., to and amongst the subjects of her said Majesty divers unlawful, malicious and seditious writings and compositions, and further contriving and intending by the several means aforesaid, to intimidate the Lords Spiritual and Temporal, and the Commons of the Parliament of the United Kingdom of Great Britain and Ireland, and thereby to effect and bring about changes in the laws and constitution of this realm as by law established, heretofore, to wit, on, &c., at, &c., unlawfully, maliciously and seditiously did combine, &c., with each other, and with other persons whose names are to the Jurors aforesaid unknown, to cause and procure large numbers of persons to meet and assemble together in divers places, and at divers times within Ireland, and by means of unlawful, seditious and inflammatory speeches and addresses to be made and delivered at the said several places on the said several times respectively; and also, by means of the publishing and causing and procuring to be published to and amongst the subjects of her said Majesty divers unlawful, malicious and seditious writings and compositions, to intimidate the Lords Spiritual and Temporal, and the Commons of the Parliament of the United Kingdom of Great Britain and Ireland, and thereby to effect and bring about changes and alterations in the laws and constitution of this realm as now by law established, in contempt," &c.

To this indictment the traversers severally pleaded in abatement—that the bill of indictment was found a true bill upon the evidence of divers, to wit four, witnesses produced before and examined by the

Jurors aforesaid; and that the said witnesses were not, nor was any of them, previously to their being so examined by the Jurors aforesaid, sworn in the said Court of our Lady the Queen, before the Queen herself, according to the provisions of 56 G. 3, c. 87, s. 1.

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To these pleas the Attorney-General demurred, and the traversers joined in demurrer. The question raised by the demurrer was argued in the same Term, and the demurrer was allowed by the Court, and judgment given that the parties should answer over to the indictment; whereupon they severally pleaded not guilty, and the jury process issued for the trial on the 15th of January 1844 (a).

By an order of the Court, dated in Hilary Term 1844, it was ordered that the issues joined in this case be tried at the bar of the Court; and afterwards in the same Term the following order was made:—"It is ordered and directed, according to the form of the statute in that case made and provided, that in case the trial in this cause so fixed as aforesaid for the 15th day of January in this same Term, should not terminate on or before the 31st of January, being the last day of same Hilary Term, then, that Thursday the 1st of February next, and every succeeding day until the 15th day of April next, or so many days thereof as shall be necessary for that purpose, be appointed for the continuation of the said trial, and that the days so fixed shall accordingly, for the purpose of such trial, be, and be deemed and taken to be a part of this same Hilary Term."

On Monday the 15th of January 1844, the trial having been called on, the traversers severally challenged the array of the jury panel, on the ground that the jurors' book had not been completed in conformity with the requisites of the Act 3 & 4 W. 4, c. 91; that the names of fifty-nine persons, duly qualified to serve on juries, had been fraudulently omitted from the general lists from which the book was made up, and from the book itself, for the purpose of prejudicing the defendants, and did prejudice them (b).

The Attorney-General demurred to all these challenges as insufficient in law, and the demurrers were allowed, and thereupon the Jury was sworn.

The trial was duly continued to the 31st of January, and upon that day the following entry was made upon the record: "And now at this day, that is to say, on the 31st day of January, forasmuch as it appears to the Court here that the trial of the said issues, so joined as aforesaid, is not, nor can the said trial thereof be concluded on this same day, it is ordered by the said Court here, that the said Jurors so empanelled and sworn to try the said issues, shall have leave to withdraw this same day from the bar of this Court here, and that the said Jurors

(a) See Arm. & T. 62.

(b) See Arm. & T. 117.

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Queen's Bench. "is to say, on the 1st of February next, at the hour of ten o'clock in the
 THE QUEEN "forenoon; and that the said defendants do again appear at the bar of
 v. "this Court at that time, in order that the said trial may be continued."
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On the 1st of February this continuance was entered:—"And now at
 "this day, that is to say, on the said 1st day of February, at the hour
 "aforesaid, the said Attorney-General for our Lady the Queen comes
 "into Court here, and the said defendants appear at the bar of the said
 "Court here, as in that behalf directed as aforesaid. And the said Jurors
 "so empanelled and sworn aforesaid also come, and the said trial of the
 "said issues is thereupon continued for a certain time, the same being
 "necessary for the purpose thereof, that is to say, until Monday 12th
 "February 1844."

On the 12th of February the Jurors returned certain findings as their
 verdict upon the issues submitted to them. The findings were entered
 up as a verdict of guilty against Daniel O'Connell, Richard Barrett and
 Charles G. Duffy upon the entire of the charges in the first, second and
 third counts respectively contained, save as to the words "unlawfully and
 seditiously" in the first and second counts contained in the fourth charge,
 before the words "to meet and assemble;" and of not guilty as to those
 words; and a verdict of guilty against John O'Connell, Thomas Steele,
 Thomas M. Ray and John Gray, upon the entire of such charges, save
 as to such words; and save also, as to the charge of conspiracy to excite
 discontent and disaffection in the army in the first, second and third
 counts contained; and of not guilty as to those words, and such last-
 mentioned charge; and as a general verdict of guilty against all the
 traversers upon the remaining eight counts, except Tierney. The find-
 ings against Tierney were, guilty upon the first and second charges in the
 first, second, third and fourth counts contained, and of not guilty as to
 the other charges in those counts; and guilty upon the the fifth count,
 and not guilty upon the remaining counts of the indictment. No finding
 was returned against Tyrrell, who had died after the bill was found.

April 25. Mr. *Whiteside*, Q. C., on behalf of Daniel O'Connell, moved to set
 aside the verdict had in this case, and that a new trial be directed, and
 that a *venire de novo* be awarded, on the following grounds:—

That the jury lists, from which were framed the jurors' book and special
 jury list for the year 1844, were fraudulently dealt with for the purpose of
 prejudicing the traverser in his defence; and that by reason thereof he
 was in fact so prejudiced, as the Jury who tried this case was struck from
 the special jury list for 1844.

That John Jason Rigby, one of the Jurors of the Jury who tried the
 case, was sworn as John Rigby, and that there was no such person as
 John Rigby, as stated in the *postea* in this cause, but that the person who

filled the office of Juror was John Jason Rigby ; and that the said John Jason Rigby, prior to his having been sworn, informed the Court of the true state of facts, and said in open Court he was not John Rigby but John Jason Rigby.

That there was no evidence adduced upon the trial in this cause to prove the fact of the alleged conspiracy or any overt act thereof to have taken place or occurred within the county of the city of Dublin.

That there was no evidence of the existence of any of the alleged conspiracies imputed in the indictment.

That the verdict was against law and evidence and against the weight of evidence ; that evidence has been received that ought to have been excluded.

That the trial had continued beyond the end of Hilary Term 1844, and did not terminate until the 13th of February following, instead of being adjourned until Easter Term ; and for misdirection.

On Mr. *Whiteside* concluding the reading of the notice of motion—

The *Attorney-General* stated that eight notices of motion had been served on the part of the several traversers ; those on behalf of Daniel O'Connell, John O'Connell and Thomas Steele, were precisely the same ; the notice served on the part of Charles G. Duffy, another of the traversers, agreed with these, adding this additional matter, that the Jury had been allowed to separate during the trial. The traversers John Gray, Thomas Ray and Richard Barrett, had served notices similar in substance to the others ; and so had Thomas Tierney ; but his notice introduced special matter grounded on the charge of the Lord Chief Justice, as far as it personally applied to him. I wish to know what number of Counsel ought to be heard on behalf of the several traversers ?

Mr. *Henn*, Q. C., with Mr. *Whiteside*, Q. C., for the traversers, contended that they ought to have the general reply on a motion for a new trial, but did not press the point, the Court expressing a contrary opinion.

It was then arranged that as the notices divided themselves into four classes, four Counsel should be heard for the traversers ; that then the *Solicitor-General* should be heard, and that four more of the traversers' Counsel should reply ; and that the *Attorney-General* should have the general reply.

Mr. *Hatchell*, Q. C., appeared for Thomas M. Ray,

Mr. *Moore*, Q. C., for Thomas Tierney,

Mr. *O'Hagan*, for Charles G. Duffy,

Mr. *Henn*, Q. C., for Thomas Steele,

Mr. *Monahan*, Q. C., for John O'Connell,

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Authorities cited:—*Lucas v. Lucas* (a); *Rex v. Mawbey* (b); *Rex v. Brisac* (c); *Rex v. Holt* (d); *Rex v. Gough* (e); *Fermor v. Dorrington* (f); *Norman v. Beaumont* (g); *Russell v. Ball* (h); *Dovey v. Hobson* (i); *Hill v. Yates* (k); *Rex v. Tremaine* (l); *Rex v. Delany* (m); *Torbock v. Laing* (n); *Evans v. King* (o); *Regina v. Frost* (p); *Anon.* (q); *Mestser v. Herty* (r); *Co. Litt.* 3, a, 3 & 4 W. 4, c. 91; *Rex v. Mahon* (s); *Deybel's case* (t); *Kearney v. King* (u); *The Queen's case* (v); *Rex v. Horne Tooke* (w); *Regina v. Vincent* (x); *Doe d. Read v. Harris* (y); *Haine v. Davey* (z); *Earl of Egremont v. Saul* (aa); *Everett v. Youells* (bb); *De Ruisen v. Farr* (cc); *Crease v. Barrett* (dd); *Rex v. Topham* (ee); *Hennell v. Lyon* (ff); *Rex v. Brady* (gg); *Rex v. Amphlit* (hh); *Wray v. Thom* (ii); *Leues Barton v. Quinn* (kk); *Rex v. Hunt* (ll); 2 *Dyer*, 1856; *Rex v. Kinnear* (mm); *Rex v. Pinney* (nn); *Rex v. Watson* (oo); *Rex v. Turner* (pp); *Attorney-General v. Good* (qq); *Belcher v. Prittie* (rr);

(a) 7 Br. P. C. 160.

(c) 4 East, 170.

(e) 2 Doug. 790; S. C. 1 Moo. & R. 71.

(g) Barnes, 362.

(i) 6 Taunt. 460.

(l) 5 B. & C. 254.

(n) 5 Jur. 318.

(p) 9 C. & P. 135; S. C. Gurney, R. 769.

(r) 3 M. & Sel. 451.

(t) 4 B. & Al. 243.

(v) 2 Br. & B. 811.

(x) 9 C. & P. 93.

(z) 4 A. & E. 892.

(aa) 6 A. & E. 924.

(cc) 5 N. & Man. 617.

(ee) 4 T. R. 126.

(gg) 1 Leach, 327.

(ii) Willes, 488.

(ll) 4 B. & Al. 430.

(mm) 5 C. & P. 254.

(pp) Ibid, 1131.

(rr) 4 M. & Sc. 295.

(b) 6 T. R. 619.

(d) 5 T. R. 436.

(f) Cro. Eliz. 222.

(h) Ibid, 455.

(k) 12 East, 229.

(m) Jebb, C. C. 90.

(o) Willes, 558.

(q) 1 Moor. 126.

(s) 8 Bli. N. C. 2.

(u) 1 Chit. R. 28.

(w) 25 St. Tr. 727.

(y) Wil. W. & D. 106.

(bb) 4 B. & Ad. 683.

(dd) 1 C. M. & R. 919.

(ff) 1 B. & Al. 182.

(hh) 4 B. & C. 35.

(kk) Batty, 555.

(nn) 7 C. & P. 276.

(oo) 32 St. Tr. 43.

(qq) 1 M. & Y. 226.

* NOTE.—The arguments on these several notices of motion occupied the Court nine days. The Reporters have deemed it judicious merely to state the cases cited by the respective Counsel.

Davidson v. Stanley (a); *Rex v. Frost* (b); *Rex v. Hunt* (c); *Rex v. Lambert* (d); *Rex v. Redhead* (e); *Rex v. Wilkes* (f).

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On Monday, April 15th, the appearance of the defendants was entered on record, and the case was continued to the first day of Trinity Term, and thence again to the 30th of May in the said Term.

The Court delivered judgment *seriatim*:

May 24.

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This is an application to set aside a verdict on an indictment for conspiracy, and for a new trial. There are several counts in the indictment, some charging several and distinct conspiracies, for several and distinct objects; some merely varying the form, but charging the same offence in substance. The principal charge, as contained in the first, second, sixth, seventh and eleventh counts, is for a conspiracy, among other matters, to cause large bodies of persons to meet and assemble at different times and places in Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby, and by means of the demonstration and exhibition of great physical force thereat caused and produced, changes and alterations in the Government, laws and constitution of this kingdom. There are eight traversers against some of whom verdicts have been found upon all the counts; against others, upon several counts and charges; against one, upon a single charge, though on several counts. Some of the objections to the verdict rest on grounds common to all the traversers; to these I shall first apply myself.

The first, that there was no evidence that any act was done within the county of the city of Dublin, has been answered by the proof that the publication of several articles in the newspapers, charged as overt acts, and relied upon as evidence of the offence laid in the indictment, was had and took place within the county of the city of Dublin, and that the Association Rooms are within it.

Another objection, that one of the Jurors sworn was not upon the panel, was founded upon the fact, that a person was sworn by the name of John Rigby, and the allegation was, that his name was John Jason Rigby; many authorities were cited and discussed, which it is unnecessary for me, in the view I have taken, to examine; for Mr. Rigby was actually summoned and empanelled by the name under which he was sworn, so that there was no substitution or mistake of the person; further, there was evidence before the Court, that he was known by that name; but what I principally rest upon, he was sworn with the express

(a) 3 Sc. N. C. 51.

(b) 22 St. Tr. 516.

(c) 30 St. Tr. 1315.

(d) 22 St. Tr. 1017.

(e) 25 St. Tr. 1149.

(f) 4 Burr. 2527.

T. T. 1844. assent, and in some degree at the joint instance and desire of the
Queen's Bench. Counsel for the traversers and for the prosecution, with full knowledge of
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The next objection was, the extension of the trial beyond the Term, and taking the verdict in Vacation. Upon which I say, that the matter is upon the record, that when the application was made on the 13th of January for the purpose of having the trial so extended if necessary, and when the attention of the defendants' Counsel was called to it, they declined to argue or object; which is a sufficient answer for the present to this objection.

The next objection was to the separation of the Jury, and the permission to them to retire to their houses upon the adjournment of the Court each day; that took place with the deliberate assent of the Counsel of the traversers, and is not an unusual proceeding, it has occurred frequently in this country in misdemeanor cases, and seems to be the necessary consequence of protracted trials, and such adjournments; but I rest upon the deliberate assent of the Counsel for the traversers, and their continued acquiescence throughout the trial without an objection until the verdict was found.

The next objection made was, that the jury-list had been fraudulently dealt with by some one with intent to prejudice the traversers, whereby an imperfect jury-book has been returned. The matter of this objection has been already before the Court in two different shapes, upon motion to quash the panel (a), and upon the challenge to the array (b). It involves questions vitally affecting the administration of justice, and its purity; and in the proper stage and course it demands full inquiry and consideration. The information given to the Court upon the facts connected with this matter is imperfect; much, if not suppressed, is not disclosed; there is a remarkable absence of any date, of any connected statement, by the persons engaged in making out the general list. It appears that the Recorder, who for this purpose constitutes the Court of Quarter Sessions in Dublin, sat on several days, from the 14th until the 23rd of November last, for the revision of the jury-lists, as returned to the Clerk of the Peace by the collectors of the several parishes in Dublin. Counsel and agents on behalf of the traversers and of others in a different, if not an opposite, interest attended before him; many objections were taken, and applications made; after much discussion the Recorder completed the revision and correction of those lists on the 23rd or 24th of November; the lists so amended contained the names and qualifications of those whom the Recorder deemed and had adjudged entitled to be placed thereon. He had struck out some names, he had inserted others in his own handwriting, and he had authenticated the list for each parish by his signature; this duty he performed

(a) Arm. & T. 115.

(b) Arm. & T. 118.

under the 3 & 4 *W.* 4, c. 91, s. 9; under which it became and was his duty to cause one general list to be made out from the twenty lists containing the names of all the Jurors whose qualifications had been so allowed, arranged according to rank and property, and delivered the same to the Clerk of the Peace to be copied into the book for the Sheriff. There seems to be no reason why this should not have been done without delay; the statute appears to contemplate the completion of the duty by the Justices before they separate, in sufficient time for the Sheriff to have the book, and to make out this special jury-list before the 1st of January following, the commencement of the year in which it was to come into operation. The Recorder gave these twenty lists to Mr. Magrath, a clerk in the office of the Clerk of the Peace, and who is said to have acted as his registrar, to make the one general list therefrom, and he left Ireland before it was completed. On the 28th or 29th of December, and not until then, a general list was delivered to the Sheriff, not containing the names of all, but from which several names, twenty-four at least, and amongst them fourteen of St. Audeon's parish, qualified to be special jurors were omitted: an error, that the difference in the amount of numbers upon the tots alone and of itself would have called attention to, and which the withholding the lists until so late a day was calculated to conceal, and had the effect, whether intended or not, of preventing any correction of the error, before the Sheriff acted upon the list.

All these circumstances, and every further consideration I bestow upon the matter, increase the difficulty I feel in holding that this was a jurors' book, and tend to confirm the opinion which I expressed when the matter was before the Court on the challenge to the array; by that opinion I abide; I hold the objection to be a sound ground of challenge to the array, and that challenge ought to have been allowed (*a*). But I think it properly cognizable in this or any particular case, by way of and upon challenge, and that it does not now form a fit ground of motion for a new trial, especially as the question had been already ruled by the majority of the Court, and remains upon the record as the subject of such challenge.

The next objection is, that illegal evidence was admitted, namely, the printed document circulated and cried about at Mullaghmast: I abide by the opinion which I expressed upon the argument of that question at the trial, and think it unnecessary to add any thing upon it (*b*).

The next objection comes under the general head of misdirection. It is, that the Court did not properly explain the law to the Jury. The Court distinctly stated, in what the crime of conspiracy consisted; that it was the concert of two or more to bring about an end illegal in itself, or an end, abstractedly legal in itself, by illegal means; that for the convic-

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(*a*) See Arm. & T. 45.

(*b*) Arm. & T. 277.

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tion of one or more persons for a conspiracy, the law required that the Jury should be satisfied and convinced that there was concert between two or more for the purpose of directly doing an illegal act, or else for the purpose of effecting or causing to be done an act legal in itself, by illegal means; that in order to convict the traversers, or any of them, of the charge of conspiracy, it was necessary that the Jury should be satisfied, not that they should have ground to surmise, but that they should have such evidence before them, as to convince their consciences, that the traversers, or some of them, did respectively, and in common combine to do an unlawful act, whether that act be unlawful in itself in its original design, or become so by the unlawful means by which it was agreed that it should be brought about (the term in one passage of the charge is "criminal," in another "unlawful," in another "illegal"); that to constitute the crime of conspiracy, it was not necessary that the unlawful thing agreed to be done should be effected, that the crime of conspiracy might be complete, although in point of fact the criminal end was never attained: nor was it necessary that the fact of meeting to concert the common illegal agreement, should be directly proved, if from the acts that were proved, they were satisfied that the defendants were acting in concert in the matter, that is, in illegal concert; that without proving a direct time or place, in which an illegal agreement was concocted between two or more of the traversers, it was for the Jury to say, were they satisfied upon the facts proved, that although the actual time of the conspiracy was not proved, yet that such conspiracy as imputed must have taken place; that the *onus* of that proof lay upon the Crown; that the Jury must be satisfied, that the guilt which was imputed had been proved, that is, that satisfactory evidence had been given of the existence of the alleged conspiracy; and if they were not satisfied of that—if that was not made out to their minds, so as to leave them above and beyond reasonable doubt upon the subject, it would be their duty not to convict upon the presumption; they were to convict only upon satisfactory proof, either direct or inferential. In this direction of the Court, so far I find nothing to fault or complain of. That the matter charged is criminal, I entertain no doubt.

With respect to the majority of the counts, there can be no question but that the subject matter charged is highly criminal. The conspiracy imputed, is a conspiracy, by collection of large assemblies of the people in various parts of the country, and by the exhibition and display of great physical force, and by means of the intimidation thereby to be caused, to produce changes in the laws and constitution. In one count it is laid expressly, to overawe the Legislature, and thereby effect the change. To conspire by physical force, and by the use of physical force to effect changes in the laws and constitution is not merely a crime, but a crime of high degree, on the very verge of

the highest. If then it be a crime of the greatest magnitude, to conspire to use physical force, for the purpose of effecting a change in the laws and constitution, it seems to be but a step short of that, to conspire to exhibit and display such a command of power, and possession of physical force, to such a degree, as thereby by intimidation, or through the dread and apprehension of the use of that physical force, to cause the changes to be made. To conspire actually to use the power and force for such a purpose, would be to conspire to levy war, nothing short of it: the charge contained in the indictment is one step, and but one step, short; it is a conspiracy to exhibit and display the means and power of using physical force, in a sufficient extent, and to such a degree, as to produce intimidation, and by the intimidation so produced, to cause changes to be made in the laws and constitution, that is, by the exhibition and display, and the menace and apprehension of the use of physical force—in other words, by the threat of insurrection, in case they be not yielded, to effect the changes; surely that is highly criminal; a conspiracy to collect assemblies of the people in such numbers and for such purposes, is in my opinion a misdemeanor of a very high degree.

The consideration of the real mischief and character of the misdemeanor furnishes an answer to the next topic of misdirection suggested, namely, that statement in the charge, that a conspiracy might exist without secrecy or treachery; the offence is a concerted endeavour, by the display and exhibition of great physical force, by the command and power exercised over and in the collection and management of such large masses, and by the intimidation to be thereby produced, to overawe and effect changes in the constitution; display and open exhibition are the tactics, not secrecy and concealment, of the confederacy, the mode of operation, the means of intimidation. To say it is no offence to conspire to produce changes by dread of the power and command of such masses, because there is no secrecy, but a studied and ostentatious display of the power to assemble, control and wield the masses in order to impress the conviction and apprehension of the extent of that power and force at command, is a position which, I think, requires no answer; no doubt, secrecy may be an object and ingredient of conspiracy; but if the object and principle of the confederacy be to effect its purpose by intimidation and the display of physical force, the tactics and mode of carrying out that object must necessarily be quite the contrary of secrecy and concealment.

The next objection is, that the Court gave its opinion on the facts of the case; instead of submitting the matter entirely and exclusively to the Jury. With respect to which, I observe, first, that it was distinctly and sedulously stated to the Jury, that they were to decide upon all questions of fact; that such were exclusively for their consideration; and in one part the Chief Justice used these remarkable expressions, "I desire, that in what I have said, it may be rejected from your minds altogether, as if

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I were giving any thing like an opinion, or any thing bordering upon an opinion with regard to the facts of this case, which will be for your final decision." Though the charge does, notwithstanding, contain expressions of opinion upon matters of fact, I am not prepared to say, that such expression of opinion of itself is a sufficient ground to set aside a verdict; my own course and practice has been to withhold whatever opinion I may entertain upon the questions or matters of fact that arise for the consideration of the Jury, and submit the consideration of them exclusively and altogether to the Jury. Though such has been my course and practice, I know that many very able Judges pursue the contrary course; and though I should not choose the instances and cases referred to by the Attorney-General on this part of the argument, as examples for my conduct or approval, yet, when there is no imputation of controlling the Jury, of misleading them upon any matter of fact, or preventing them from examination and unfettered decision thereon, I think it would be going further than any case I recollect, to hold that the mere expression of the opinion of the Court upon matters of fact to the Jury is a sufficient substantive objection to, and valid ground for setting a verdict aside.

The next objection is, for misdirection, in leaving the reports in a newspaper published by one of the traversers, of occurrences at certain meetings, as evidence against another that the acts and speeches therein stated did occur, and were spoken by that other, as furnishing proof against him that he was engaged in the conspiracy charged against him.

As a general proposition, it is plain that the report in a newspaper is no evidence against any person but those engaged in the composing, publishing and editing of it; but it is said, that this was a declaration or publication, and so an act in furtherance of the conspiracy by a co-defendant, and is therefore not only evidence against the publisher, but against every other member of the confederation.

It may not be immaterial to advert to the manner this publication has been laid in the indictment as an overt act. First, it charges, that in pursuance of the conspiracy, a particular traverser, Daniel O'Connell, made a speech at a particular meeting; and then charges another traverser, in pursuance of the conspiracy, with publishing in the form of, and purporting to be, a report of that speech, the same matter. It is argued for O'Connell, that the publication, for instance, the *Pilot*, though admissible in evidence against Barrett, and to go to the Jury so far as proof of his act, yet, that it was not admissible, and ought not to have been left to the Jury, as evidence against O'Connell, either to show that he was present at any such meetings, or made the speeches imputed to him. The objection has been rested on two grounds; first, that the proof of publication here, was only the statutable proof which is merely made evidence against the editor or proprietor, and not against any other party. As to

which, it does appear to me, that when the statute substitutes such proof as conclusive evidence against the proprietor on every proceeding touching the paper, it makes it sufficient proof against any one affected by his acts. Further, it was proved the paper was lodged in the Stamp-office, with the signature of Barrett upon it. It was said that this was no evidence of publication beyond the individual paper lodged; but no such further proof is necessary, because the composition and printing of that paper, though but one were printed, is brought home to Barrett, and further publication is not necessary, as decided in *The King v. Stone*. It therefore appears to me, that the proof is conclusive against Barrett, that the paper was his act—his verbal act, to adopt the expression of *Phillips*, in his book on *Evidence*—and that it was also proof of that publication as an act of Barrett against any other person who might be affected by his act, or wounded through his side, but as against O'Connell, it is merely proof of Barrett's act, that he composed and published the paper.

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The important question remains, was the newspaper evidence against O'Connell and the other traversers, of the truth of the matters stated in it; that he attended the meetings, and spoke the speeches imputed to him therein? It was merely the act of Barrett, and O'Connell was not proved to have had any connection with, or knowledge of the paper; he had no share in the publication or composing of it; it affects him only so far as an act of Barrett's can; it proves *per se* no act or speech of O'Connell's; it is no admission of his that he spoke what it contains: and his Counsel very properly rely on the rule, that being as to him mere hearsay evidence of the facts and matters related therein, it is not legal evidence as against him to prove that such facts and matters did actually take place; when words or writings are not acts in themselves, nor part of the *res gestæ*, but a mere relation of some part of the transaction, or of the share which other persons had in the execution of it; the evidence is not in its nature original, it depends on the credit of the narrator. On the part of the prosecution, they first say, it was evidence against O'Connell and the others, that it is a publication, an act (verbal act) of Barrett in furtherance of the conspiracy, and therefore evidence against all the defendants, though part of it be narrative; and they rely on *Rex v. Stone* (a). The letter there contained no narrative matter, but information as to the condition of England, and its ability and means of defence in case of invasion; so the case does not apply to the matter in question here. *Rex v. Hardy*, and the determination in that case upon Martin's letter to Margot, was strongly pressed; neither was there any narrative or hearsay in that letter of any act or declaration of Hardy, but it was ruled to be admissible as evidence of the existence of conspiracy, not as a relation of an act done by Hardy, nor that Hardy was party

(a) 6 T. R. 527; 25 St. Tr. 1278.

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to the conspiracy. It is material to attend to the two points that were ruled there, one as to Thelwall's, the other as to Martin's letter, and to the reasoning of the Chief Baron and Baron Hotham on the first, and of Buller, J., both where he differed from, and where he agreed with them (a): he says, "There are two things to be considered in an indictment of this sort; first, whether any conspiracy exists; next, what share the prisoner had in that conspiracy. It appears to me, that when we are considering the first question, any thing that passed from any person who is proved to be a party in the conspiracy, ought to be received as evidence; and it is received for the purpose of showing what was the extent and nature of the conspiracy." Then, after giving his reasons for thinking the letter admissible for that purpose, he adds, "But before it can affect the prisoner materially, it is necessary to make out another point, namely, that he concerted to the extent the others did;" and adverting to the same distinction, he enforces it by reference to the case of Lord Russel, and goes on to say, "The first question to be made out is, that there was a conspiracy to affect the life of the King; to make out that, you must go into evidence of what was done by other persons; when established, I agree that that would not affect the prisoner, but it is first necessary to show that there was a conspiracy on foot, and then you go on to see whether there is or not evidence that the prisoner was acting a part in that conspiracy." So that the case appears to me to furnish an authority, not for, but against the argument for the prosecution upon this question.

Upon the part of the prosecutor, it has been further argued, that this was an act of publication in furtherance of the conspiracy, and, therefore, the whole of it was evidence against all charged as taking part in the conspiracy; though a portion of it be but narration, it was admissible in evidence against Barrett, and could not have been rejected, nor excluded from the consideration of the Jury, so far as acts of Barrett can affect O'Connell. But no authority is adduced to warrant the position that a narration by Barrett of matters imputed to O'Connell is evidence of the facts against him until they have been proved conspirators. The objection is, that it was left to the Jury as proof of the acts of O'Connell, from whence they might infer that he was a party to the conspiracy, whereas O'Connell said he ought not to be made answerable for the mistakes of reporters; and with the exception of what he had said, and had been proved, he submitted as matter of law, these papers were not evidence against him; and he complains now, that these newspapers were left to the Jury, as evidence of the fact of conspiracy against him. The cases which have been cited go to show that the acts of a co-conspirator are evidence against all; and it has been argued on the part of the prosecution, that

(a) 24 St. Tr. 476.

the verbal acts of some are evidence against all. That argument rests upon the assumption and foundation that they had been shown to be co-conspirators, that the conspiracy had been established, and such acts then made proof. But as it has been justly argued on behalf of the traversers, the objection here is, that such act of the one was left to the Jury as proof of the conspiracy by the others. If there was no conspiracy, the representations of Barrett were no evidence against O'Connell, and therefore, the representations of Barrett ought not to be left to the Jury as evidence that O'Connell was engaged in the conspiracy; yet, it appears to me, that they were so left to the Jury by the Court; the Court observing "that those great assemblies and monster meetings were brought together and did take place, seemed to be agreed; and that the bands and banners go but a little way to establish the crime imputed, that is, the design by intimidation and by demonstration of physical power to overawe the councils of the nation," says to the Jury, "But the striking feature in the meetings is, the immense masses in which the people were collected, and the nature of the speeches delivered. Generally, those speeches were made by Daniel O'Connell, but he was not alone or singular in being the person who addressed the multitudes; you will say, whether from the nature of those speeches, they were acting in pursuance or promotion of a common design, and that a criminal one; it will be for you to judge on this point:" and then passages from the reports of the speeches in the *Pilot* and other papers are submitted to the consideration of the Jury. That appears to me, to be distinctly leaving to the Jury these reports as evidence of speeches, as evidence of the facts, that O'Connell was at those meetings and made those speeches; from which the Jury were to draw the inference, whether or not the traversers, he and the others, were acting in the prosecution of one common design, and that the criminal one charged. The *Freeman's Journal* of the 30th of May contains an account of the Longford meeting; and a speech of O'Connell as there reported, was, I think, properly submitted to the Jury, because Jackson deposes that at the Association next day, O'Connell did, save as to one typographical error, vouch the correctness of the report, and thereby made it evidence against him. But two other documents were submitted to the Jury; namely, the *Pilot* of the 14th of June, giving an account of the meeting at Mallow, and that of the 16th of August of that at Tara. These papers were left with strong observations to the Jury, against O'Connell, as evidence of his having spoken those speeches; it was assumed that he did speak them, for strong observations were made on the tendency of those speeches, and the intentions of the man who made them; the Court distinctly left these to the Jury as evidence, with the other speeches actually proved to have been spoken (those at Clifden and Mullaghmast especially), and in support of the strongest charge in the indictment.

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T. T. 1844. The Jury are asked, "Is this threat and intimidation, or is it discussion;
Queen's Bench. "is it seeking to procure a change in the law and constitution by intima-
 THE QUEEN "tion and the show of physical force, or is it free and fair discussion, such
 v. "as might properly be adopted and resorted to by persons who have poli-
 O'CONNELL. "tical rights to advance? It is for you to say what is the meaning and
Judgment of "the object of those speeches, those displays, those statements of physical
 PERRIN, J. "force; that is what he signifies in express terms, what is the meaning
 "of it?" It is plain, therefore, that these reports and speeches were left
 to the Jury as evidence of a conspiracy, and as proof whence the Jury
 might infer that O'Connell had engaged in this conspiracy. It therefore
 appears to me, having regard to the manner in which those papers were
 left to the Jury, that, so far as they contain reports of speeches of
 O'Connell, they do not come within the rule which makes the declara-
 tions of co-traversers evidence, the conspiracy not having been previously
 established, but thus being offered as proof of the conspiracy—in fact, to
 establish the conspiracy charged against O'Connell.

But it is said, no objection was made to the admission of this evidence
 on the trial, and, therefore, it is now too late. No objection could be
 made to the reading of the papers even as declarations of the proprietors,
 who were all on trial; these newspapers were admissible in evidence against,
 and as the acts of Barrett, Gray and Duffy, and so far as their acts might
 affect O'Connell, against him, as publications by them calculated to have
 had effect on the public mind; but not as evidence against O'Connell or
 the other traversers of the truth of the statements therein, of the fact of
 speeches of O'Connell as actually made by him, in order to found an
 inference that he was engaged in the conspiracy. These papers were
 strictly admissible in evidence, and could not be withheld from the Jury
 as against Barrett; yet, the objection taken on the part of O'Connell was
 open to him, and I think there was misdirection in leaving this evidence
 to the Jury as proof of acts of O'Connell at Mallow and Tara.

Further, it was argued that it is now too late to make the objection,
 that it ought to have been made at the trial by Counsel, when it might
 have been rectified on the attention of the Court being called to it; to
 which I think Mr. Fitzgibbon's answer is full and perfectly just, "That
 "it was not more incumbent on the Counsel for the traversers to see
 "that the law was properly adhered to, than it was for every member
 "of the Court. The negligence, remissness, or inattention of Counsel,
 "in a Court of criminal jurisdiction, cannot be admitted as an answer
 "to a misdirection, which it was equally the duty of every member
 "of the Court to avoid and to correct." I concur with him: it is not
 an answer in a criminal case to say, that the objection was not made
 at the trial, if injustice was or may have been done. It is the duty
 of the Court, and of every member of it, to take care that the case be
 fairly submitted to the Jury, and if an error has been committed, it is our

duty to correct that, so far as we can, and to take care that it may not be attended with further injustice, and that the verdict found upon such error shall not be suffered to stand.

Again, it has been said that O'Connell used the newspapers himself. I do not find that he used any papers that contained a report of the meetings at Tara or Mallow. I put the Longford meeting out of the question, for he adopted that report. The other traversers called for the reading of various other matters in the newspapers; so far as they did, they made them evidence against themselves, but that does not make these reports evidence against O'Connell, who did not use them or call for the reading of any part of them.

As to another argument on the part of the prosecution, that the Court should not disturb the verdict because there was no affidavit that O'Connell did not make these speeches, I cannot consider that of any validity. The Court have allowed evidence to go to the Jury, which ought not to have gone; and I never heard, in a criminal case, that such an objection was required to be supported by an affidavit denying the fact, or guilt imputed. That appears to me a monstrous proposition, unsupported by authority or principle.

It has been said further, that the Association published the *Pilot* and *Freeman* newspapers through the repeal wardens, and that O'Connell, as a principal member of the Association, must be responsible for the contents of those papers. I am by no means prepared to go the full length of that argument, even if it had been shown that these papers had gone through the hands of the repeal wardens; but there is no proof that they did, or that any copy was published beyond the identical copy which was produced; and the case of *Watts v. Fraser* expressly decides that the Court are not at liberty to presume that any other copy was printed, much less published.

But it has been said, that there was abundant proof besides; and in addition to this objectionable evidence of the Mallow and Tara meetings in the evidence as to the Longford, Clifden, and Mullaghmast meetings and speeches, to sustain the verdict against O'Connell. So far as a Judge can express an opinion on the weight of such evidence, and in discussing this matter on a motion for a new trial, I am called on to express my opinion thereon, I think there was evidence to warrant and sustain the verdict, independent of those objectionable reports and newspapers; but I do not feel myself at liberty to say what opinion the Jury would have come to thereon, without this additional matter. I cannot say how this very evidence may have affected the Jury; therefore, on the principle laid down and acted on in *Wright v. Tatham* and *De Rutzen v. Farr*, as this evidence was put directly to the Jury, whence they might infer conspiracy and guilt against the traversers besides Barrett, I cannot say, if it had been withheld from them on the consideration of that question, that they would

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have arrived at the same conclusion. Wherefore, upon the whole argument upon this objection, I am of opinion that these newspapers were not legal evidence against O'Connell that he had attended those meetings and spoken those speeches, and that the Jury were in this respect misdirected on an important matter; and on this ground I think the verdict ought to be set aside.

Another objection was made, that the attention of the Jury had not been sufficiently or properly drawn to the evidence on the part of the traversers, with respect to their disclaimers of using force, the inculcations for preserving order, and committing no breach of the peace at those meetings, and to the speeches of O'Connell in 1799 and 1810. The Court did not detail those matters nor observe upon them; they were not denied or disputed; the matter of those speeches was not really a subject of discussion at the time. It was not denied that O'Connell was sincere in his efforts to procure a repeal of the Union; but the question was, whether he intended to do that by illegal means or not? therefore it does not appear to me that those speeches were *ad idem*. In the same way, the anxiety to keep order and to prevent any breach of the peace, and that none was committed; that these vast assemblies were perfectly manageable and obedient, may not have been considered evidence disproving the charge, or in favour of the traversers: it may have been just the other way; it may have been considered an object for those who wished to overawe the Parliament, or the other subjects of the realm who differed from them, by the display of physical force to show the extent of their power, by showing the degree of discipline in which the masses were—how orderly and regularly collected, assembled or dispersed—how formidable instruments the people so held in hand were.

I shall now advert briefly to the case of Tierney. Several additional objections have been made on his behalf; that there was no evidence that he knew of any acts of criminality of the Association, previous to the month of October, or of the meetings or speeches at Tara, Longford, Clifden, or Mullingar; or that he was ever acquainted with, or had seen any of the traversers except O'Connell, before the 3rd of October; that the Jury were misdirected with respect to him; that there was no evidence to warrant them in finding a verdict, and if there was any to be submitted to them, it was not left to them with the observations which ought to have been submitted to them. He attended the Association, which had openly held its meetings in the seat of Government, bringing in contributions to its funds on the 3rd of October; and his attendance and conduct there was the principal evidence against him. He handed in money, and he made a rash and reprehensible speech, very unlike what one would expect from a gentleman of his profession and education. Then, immediately O'Connell makes a speech thanking Tierney for his conduct. That is the main evidence against Tierney;

and it has been argued on his behalf, that it is not evidence on which the Jury should have found him guilty of having conspired with the others. He has been convicted on the eighth count of the indictment, that of exciting hostility between the Irish and the English. In order to warrant that verdict, the Jury ought to be satisfied that there was an actual confederacy formed between him and the others, and although they may infer that, they must find it in fact, and unless there be confederacy shown and found, the reprehensible speech, and contribution of money was not enough to establish a charge of this description.

It is true there was a general direction given to the Jury, as to the necessity and obligation of their being satisfied that there was concert and conspiracy before they could convict him; but coincidence of opinion or of expression is not conspiracy, and there ought to be proof or evidence against each, whence a concert may be implied. If there was not evidence to warrant them finding a confederacy between him and the others, he should have been acquitted. Conspiracy is a fact to be found by a Jury, not an inference of law flowing from a violent speech. When and where did he conspire with the others? It is not to be overlooked that Tierney, in the speech he delivered in the Association, referred to the battles of Benburb and Yellow Ford, two places alluded to in the card of the Association, which might show that he was a member of the Association; but the Association has not been throughout the trial charged to be *per se* an illegal confederacy. It is asked by the Court, in summing up, why Tierney introduced these references into his speech? It is then put, whether or not he then adopted the objects and views of the Association with O'Connell and the other members now accused with him? It ought to have been first inquired whether or not he knew or was aware of the views of O'Connell and the other members now accused with him, or whether there was evidence thereof?

There is a want of accuracy in this part of the charge that ought not to exist, because he might become a member of the Association and not a member of the conspiracy. It ought to be shown how he could adopt previous misconduct, or what evidence there was that he had done so? I think there is no evidence that Tierney knew of the previous meetings at the different times and places mentioned, and the speeches thereat; or that he was a party to the common design of those who attended and spoke there. There is, therefore, a want of precision, which may have misled the Jury, in this expression of the Court, "Whether Tierney "knew or did not know of the existence or particulars or nature of those "proceedings, we do not exclude from your consideration." At all events the Jury should have been more positively told, that if they were satisfied there was concert between him and them, they should find him guilty; if not, they should acquit him: instead of being told that he certainly might have known them, and that it was for the Jury to say whether he could

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have avoided knowing them. With respect to him, therefore, I think we rather withdrew the real question from the Jury, without pointing their attention to any evidence showing previous communication or privity with the illegal common design; as against him it was left on loose and vague probabilities, to say whether he was a participator in the common design, whether he had adopted that Association and undertaken to carry out the same designs by the same means?

It is not enough to say, that in other parts of the charge the direction was right. I think, therefore, as regards Mr. Tierney, these are additional grounds why the verdict ought to be set aside.

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Two classes of objections have been taken to this verdict; first, those which are formal; secondly, those which are substantial. Both these must be considered.

In order that judgment should be pronounced on convicted parties, the Court should be satisfied, not only that substantially justice has been done in the particular case, but also that the trial has been duly conducted according to legal form. If there be a departure from legal form, and the objection appears upon the record,—or, if not appearing on the record, and neither cured by the statute nor waived by the defendant,—it be brought by affidavit before the Court, the party must have the benefit of it, however remote the objection may be from the merits of the case. We would not put the defendants to the circuity of a writ of error, where the record shows that there has been a mistrial; and where a mistrial has, in fact, taken place, or a fatal irregularity has occurred, it is a sound and proper exercise of the discretion of the Court, to give relief, upon motion, to an injured party. The forms of the law are fences for the protection of innocence, and we must not suffer them to be prostrated in order thus irregularly to punish guilt. On the other hand, it would be manifestly unreasonable to allow a mere formal objection (when the Court is called on to exercise a sound discretion) to prevail against the justice of the case, when the party objecting has misled the prosecutor by a previous waiver of the objection on which he now relies, or by having omitted to make it in due time.

The first objection relied upon is—"That there has been a mistrial in 'this case, in consequence of Mr. Rigby (one of the Jurors) having been 'sworn on the Jury by the name of John Rigby.'" Mr. Rigby's name was John *Jason* Rigby; but on the jurors' book and on the panel, the name is John Rigby, and by the name of John Rigby Mr. Rigby was summoned and was sworn; and he was sworn on the Jury, not only without any objection made by the defendants, or any of them, but he

was sworn at the instance of one of the defendants' Counsel. The Attorney-General insisting *only* that, if sworn, Mr. Rigby should be sworn by the name of John Rigby, the name appearing on the panel, in order to prevent what otherwise would make error on the record. There was no doubt whatever as to the identity of the individual,—that he was the person who was returned by the collectors and placed on the jurors' book, and also on the panel: and indeed, there was some evidence, that if his baptismal name was John Jason, he was also well known by the name of John Rigby. All this was clearly shown upon Mr. Rigby's examination in Court. This objection was not taken until the Jury were about to hand in their verdict, and after the traversers had been generally apprised of the adverse character of that verdict. The answer, then, to this objection, upon which a multitude of cases have been cited, are these: first, the objection does not appear upon the record, which separates this case from that class of cases of which *Rex v. Delany* is one, and in which the Court, to avoid the circuitry of a writ of error, sets aside the verdict upon motion, or advises the Crown not to punish; but it is a motion to the discretion of the Court: secondly, it is not the case of a wrong person being sworn on the Jury in the name of another person who was summoned; though if such were the case, it would still be a case for the Court to exercise its discretion upon; and this circumstance separates the present case from that class of cases relied on by the defendants, in which a person not at all entitled to be a Juror has, notwithstanding, been sworn, and acted as a Juror. But, at the utmost, this is the case of the right person being sworn, but being sworn by a wrong name, there being a misnomer of him both on the panel and on the *postea*: thirdly, the objection in this case was not made in due time, if tenable at all; and the cases of *Wray v. Thorne* (a) and *Rex v. Frost*, are (if we wanted authorities) express (especially the latter), to guide our discretion upon this matter.

The second objection is rested also on the ground of a mistrial. It is, "That the Court had not jurisdiction to extend the time of trial beyond the Term in which it commenced." This question depends upon the construction of the statute of the 1 W. 4, c. 31, s. 3, by which it is provided, "That if any trial at bar shall be directed by any of the said Courts, it shall be competent to the Judges of such Court to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in Vacation, shall for the purpose of such trial be deemed and taken to be a part of the preceding Term." Under this section it is contended that the Court may fix a trial at bar to commence on any day in the Vacation after Term; as by its ordinary authority it may fix a day or days for a trial at bar to commence during Term; but

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(a) Willes, 488.

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 v. extend to the case of a trial begun in Term time, and not concluded
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 Judgment of statute, and that the Court cannot supply the omission. I admit the
 CRAMPTON, J. doctrine, that if this be a *casus omissus*, if it be not within the scope
 of the statute fairly interpreted, there has been a mistrial, and this verdict
 ought not to stand. But, in my opinion, there is no *casus omissus*
 here. I think, upon the true construction of the statute, the case before
 us is not only within the mischief to be remedied by the statute, but
 plainly and necessarily implied in its terms.

The inconvenience the Legislature had to deal with was this:—the
 Court, by its ordinary jurisdiction, could order a trial at bar for any day
 or days in Term time; but it could not order a trial at bar, commencing
 in Term time, to continue in the Vacation; nor could it order such
 a trial to commence in the Vacation. Accordingly, to meet this in-
 convenience, the terms of the statutes are as general as possible.
 “The Court may appoint such day or days (for the trial at bar) as they
 “shall think fit, i. e., any day or days in or out of Term; and the time
 “so appointed (that is, the day or days if in Vacation) shall, for the
 “purposes of the trial, be deemed a part of the Term.” The Court
 may, under this provision, appoint any day or days they may think fit;
 of course they may appoint some of those days to be in the Term, and
 some to be in the ensuing Vacation. There is nothing to restrain the
 generality of the words giving to the Court the choice of the days of
 trial; whereas, the defendants' construction requires us to restrict that
 generality, by reading “such day or days as the Court shall think fit,”
 as if it had been written “such day or days in Vacation as the Court
 shall think fit.” But we can no more restrict than we can enlarge the
 enactment. From the language of the statute, two things, I think, are
 plain: first,—that the fixing of a trial at bar to begin in Term time
 was contemplated by the Legislature; and, secondly,—that it also con-
 templated that such a trial might be in connection with days in Vacation.
 It required no enactment to enable the Court to fix a day or days for a
 trial at bar to be had wholly in Term time; and yet the enactment clearly
 includes such days, there being no restriction as to the days, but the dis-
 cretion of the Court; and the words, “*If in Vacation*,” plainly show
 that the time appointed for the trial might or might not be in the
 Vacation; that is, it might be in Term time, but *cui bono* any legislative
 permission to the Court to fix a day or days for trial in Term time,
 unless in connection with a time, some of which was contemplated to be
 in the Vacation. The Court, of its ordinary authority, could fix a day
 or days for a trial at bar to be had wholly in Term time; and it is absurd

to suppose that the Legislature would think it necessary to have such days deemed a part of the Term. It plainly follows, then, that the Legislature meant to provide for two cases; one, the case of the Court fixing a trial at bar to commence in the Vacation; and the other, the case of a trial at bar fixed to commence in Term time, but which might run into the Vacation; and accordingly the language is, the time so appointed, *if* in Vacation, shall be deemed part of the preceding Term; that is, the time so appointed, or so much of it as may be in Vacation. This understanding of the words, "If in Vacation," does no violence either to sense or grammar. It carries out the plain intention of the Legislature, and it obviates a mischief which the statute was intended to cure.

Indeed, one of the Counsel for the defendants admitted this to be the true construction of the statute, but contended that the power given to the Court by the statute had not been duly executed by the orders appointing the time for this trial at bar. But upon reading the two orders together, it is plain that the Court intended the trial to commence in Term time, and to proceed in the Vacation if not concluded during the Term, and that the intention of the Court has been quite sufficiently expressed. As to the objection that the order was bad because it appointed days upon a contingency, I need only say, that any order appointing days in Vacation must be liable to the same contingency, since more days than one are only appointed for the contingency of the trial not terminating on the first day; and when making the order, it must always be contingent whether the days after the first day shall be deemed, even for the purposes of the trial, to be part of the Term or not. But again, I further say, that this second objection is one which appears upon the record, and though that would not be a reason for refusing a new trial, if on this ground we were clearly with the defendants, yet it might furnish a reason, if the question were one involving doubt and difficulty (which I think it does not), for leaving the defendants to their writ of error—I do not say, to a motion in arrest of judgment, because the defendants have elected to bring the question before us in the shape of a motion for new trial.

The third objection that has been argued is, "That neither the conspiracy imputed to the defendants, or any overt act of it, was proved to have taken place in the city of Dublin, where the venue is laid." This objection (as well as others) was made before verdict, but after the Jury had retired to consider of their verdict. It is not, perhaps, too late, but it certainly is not entitled to much favour; but the answer to it is, that it fails in point of fact. There is abundant evidence of overt acts in the city of Dublin. First.—The newspapers proved and read at the trial, coupled with the publisher's declaration, also proved, show that they were published in the city of Dublin; and these are laid as overt acts. Secondly.—There is some (though it is but slight) evidence upon the

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notes of the trial, that the Corn Exchange, the scene of the Association meetings, and the place where its addresses and proclamations are dated, is situated in the city of Dublin. The evidence to which I allude is that of Brown, the printer to the Association, who says, "I have heard of an Association in the city of Dublin, called the Loyal National Repeal Association of Ireland."

The fourth objection was, that there was a mistrial in consequence of the Jury being allowed to separate each day at the adjournment of the Court, and to retire to their respective homes. Now, I would hold this objection, which addresses itself to the discretion of the Court, to be unfounded in principle, even if that separation were not the result of a compact between the parties, as it was in this case. Such an arrangement grows out of the necessity of the case. The trials of former times were generally concluded in a day, but the protracted trials of modern times make it necessary for the purposes of justice, for the safety of the Jury, and for the benefit of the prisoner himself, that the course pursued upon this trial should sometimes be adopted; and such has been the modern practice in this country, and also in England.

The fifth objection is, "That the jury list from which the jurors' books and special jury for the year 1844 were framed, was fraudulently made up for the purpose of prejudicing the traversers upon their trial, and that they were so prejudiced." This objection is grounded upon two propositions. First.—That the jury list for the year 1844 was fraudulently made up, in order to prejudice the traversers in their defence; and, secondly—that by such fraud the traversers were prejudiced in point of fact.

Now, in my opinion, the traversers have altogether failed to establish either of these propositions, and they were bound to establish both. The subject has been brought before us by affidavits. Upon mere facts there is little of contrariety, but in the inferences from these facts there is much of discrepancy. The extract from the Recorder's speech, which we have in Mr. Kemmis's (the Crown Solicitor) affidavit, contains the substance of the facts. But we have had abundance of opinion, of impressions, and of inferences—inferences which, I must say, seem to me to be deduced rather from the passions and prejudices of the deponents than by any legitimate conclusion from the facts of the case. The traversers and their solicitors swear, to their belief, that the general list was fraudulently made up to prejudice this trial. Their Counsel indulge largely in surmise, suspicion, and imputation. But it is remarkable, that although fraud is sworn to, there is not an individual in existence against whom fraud in this matter is charged, much less proved. The Recorder is not; he never was or could be suspected. The Crown Solicitor, and all employed on the part of the Crown, are unconnected with the preparation of this jury list, and they are pronounced to be

beyond suspicion. The Clerks of the Peace are acquitted. Mr. Magrath, the registrar to the Recorder, upon whom, on former occasions, insinuations, perhaps from all quarters, were thrown out, is now pronounced not guilty; and the clerks of Magrath have denied the fraud, and are not now indeed accused of it. Thus the matter of fraud is rested upon the general allegation that somebody committed it, and with the view of prejudicing the defence in this case. This is the opinion of the traversers and their solicitors. On the other hand, the Crown Solicitor does not believe that there was any fraud meditated or perpetrated. The Clerks of the Peace, and their clerks, swear that no fraud, to their knowledge or belief, was committed or intended; but they do state that an accident, a mere mistake, has caused an inaccuracy in the general list, out of which all these clouds of suspicion and detraction have arisen.

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It is impossible for this Court to presume fraud. We cannot assume that a fraud was committed, merely because parties swear they believe it was committed, unless we find there are facts to warrant such belief. Here we are called on to presume fraud to prejudice the defendants, not only without evidence, but even against the evidence which we have before us. The matter has been explained, perhaps as far as it could be explained by any proceeding in this Court; and, stripped of all exaggeration and inflammation on one side and on the other, it stands thus:—The Recorder at his sessions had investigated and corrected the collectors' lists of the twenty parishes of the city of Dublin, and signed his name to the lists so corrected; another duty remained for him to discharge. The parish lists so corrected were in alphabetical order. The Recorder's second duty was, from his corrected lists to cause one general list to be made out, containing the names of all persons whose names stood allowed on the corrected lists, and to have those names arranged according to rank and property (not in alphabetical order as they were placed in the collectors' list); and this general list so arranged, the Recorder had to deliver to the Clerks of the Peace. Here ended the Recorder's duty. Then the Clerks of the Peace's duty began, which was, from the Recorder's general arranged list, now in the custody of the Clerks of the Peace, to cause to be made out in a book a fair copy of that general list, with proper columns, and thereupon to deliver that book into the hands of the Sheriff; and that book so placed in the Sheriff's hands became the jurors' book for the year 1844, commencing on the 1st of January. From this jurors' book the Sheriff made out his special jury list for the year 1844; that list he made by selecting from the jurors' book all such persons as, according to the allowance of the Recorder, were qualified to be set down as special jurors: of those there were nine classes, viz.,—peers' sons, baronets, magistrates, those who had served as sheriffs, those who had served as grand jurors, bankers,

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wholesale merchants, and traders worth £5000; on this special jury list the names are placed in alphabetical order.

Now, no mistake is alleged to have been made, either by the Clerks of the Peace or by the Sheriff; but it is clear that a mistake was committed in making out the Recorder's general list. It appears that the names of twenty-four persons, qualified to serve as special jurors, are either altogether omitted from the general list, or appear on it only as common jurors, nineteen being omitted altogether, and four appearing on it only as common jurors. Therefore the special jury list for the year 1844 is deficient as to those twenty-four names. That this mistake has grown out of negligence in some of the clerks in the office of the Recorder's acting registrar, there can be no doubt; but upon reading all the affidavits, and considering all that Counsel have argued upon the subject, I have arrived at the conclusion (and that a clear conclusion), that there was no fraud whatever in the transaction. Indeed, if this objection were to prevail in this case, I know of no case in Dublin, or at any Assizes in any county, in which any convicted defendant, of any persuasion, having discovered an error in the jury list, and having sworn he believed that error to be a fraud intended to prejudice him and others, might not claim the benefit, or rather (for that is the ground upon which it is put) the chances of a new trial.

And this leads me to the second proposition upon which this part of the defendants' motion is grounded, viz., that the defendants were by this supposed fraud, in fact, prejudiced in their defence. One of the learned Counsel deprecated our trying this point by the doctrine of chances. Well, be it so. But is not the defendants' motion grounded on that very same doctrine? The Jury who tried the case are admitted to be all men beyond the possibility of legal impeachment; they are admitted to be all highly respectable and honourable men, and they gave their verdict under the sanction of a solemn oath; so far as the Jury is concerned, therefore, the verdict is unquestionable, and a new trial (on this ground) can only be sought for to give the defendants the chances of a more favourable Jury. Now, was ever such a proposition before submitted to the consideration of a Court? But how can any sane man talk of the defendants being really prejudiced by the omission of the twenty-four names? There are now, it appears, on the special jurors' list, seven hundred and forty-one names of qualified special jurors; can any man venture to say that if the twenty-four omitted names were now added to that list, and a new Jury struck, the defendants would have a more favourable Jury than that which tried them? They would, I admit, have the chance of a more favourable Jury, and they might have a less favourable Jury; and the same thing may with truth be said by every defendant who has had a verdict against him on the criminal or civil side of the Court.

It is now said that one of the Jury had a prejudice against the principal traverser ; if so, why was he not challenged ? why was not an objection made at the time ? The suggestion comes too late to deserve any attention. But I must say, this Court cannot, with safety to the administration of justice, go into such speculations about the constitution of Juries. We cannot, sitting here as Judges, notice any difference of religious persuasion in the parties or the Jurors who come before us. We cannot assume that there is any difference of legal competency or fitness to discharge the office of Jurors in any case between Protestants and Roman Catholics ; we must rather assume that with the same evidence before them, a Jury of Protestants, and a Jury of Roman Catholics, and a Jury mixed of both classes, acting honestly and conscientiously, as we must suppose them to do, would arrive upon their oaths at the same conclusion. On this part of the case I would say, in the language of the present Lord Wynford, in the case of *Rex v. Hunt* (a), " Taking it to be an application to the discretion of the Court, the true rule is this : if the officer has not done his duty he is to be punished for it ; and if his omission has actually produced prejudice to the party, then it is in the discretion of the Court to prevent injustice being done, by granting a new trial. In this case the omission is not shown to have been prejudicial to the defendant, and, therefore, I think the rule ought to be refused."

But further, were the Court to grant a new trial upon the ground I have been just discussing, could it serve the purpose of a better trial ? How is the second Jury to be constituted ? Is it to be taken from the jurors' book of 1844—that book which is denounced as a fraud and a nullity ?—if so, we should have to set aside a second adverse verdict, upon the same ground as we are now called on to set aside the present verdict. Or are we to go back to the jurors' book of 1843 ? Why, a Jury from that book was deprecated above all things by the defendants, and the trial was postponed on the traversers' motion, and by the Crown consent, expressly in order to prevent the Jury being taken from the book of 1843. The defendants' case, then, is this, we can have no fair trial, either by a Jury from the jurors' book of 1843 or the jurors' book of 1844. And the verdict is to be set aside in order that there shall be no trial at all : for it comes to that, unless, indeed, the plan devised by some of the learned Counsel be adopted—viz., to set aside the verdict ; then to have a *mandamus* to the Sheriff to give back the jury book to the Clerks of the Peace for amendment ; then a *mandamus* to the Clerks of the Peace to give back to the Recorder the general list ; and lastly, a *mandamus* to the Recorder to amend his general list by inserting—I know not whether it be twenty-four or sixty additional names from the revised lists : and then the process of handing over the list by the

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(a) 4 B. & A. 432.

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Recorder to the Clerks of the Peace is to be again gone over; then the Clerks of the Peace are to amend the jurors' book, or make a new book, and hand it over to the Sheriff, who is therefrom to amend his special jury list; and during all this series of proceedings, which the learned Counsel in their great simplicity seem to think might be completed within a Term or two, the course of justice, in the city of Dublin—both civil and criminal justice—is to stand stock still. The result would plainly be that long before this series of legal operations could be performed by the skilful practitioners who have conducted this defence so ably and so slowly, the new jurors' book, I mean the book for 1845, would be in operation; and is any man so hardy or so wise as to predict that the book for 1845 will be, in the city of Dublin, a book without any omission or wrong insertion? or could any man now say that there is any jurors' book in any county in Ireland that could escape from the criticism of the eight solicitors and sixteen or twenty learned Counsel concerned for the defendants? sure I am that there is not.

But, I must say, I more than doubt the power of this Court to grant such a *mandamus*. In making out this general list, the Recorder or the Justices are exercising a discretion: they are to determine what names are to be allowed as those of qualified persons, and what names are to be disallowed. We cannot interfere with that discretion. Secondly, they are to arrange the names of all the Jurors so allowed in the general list, according to rank and property. This is a very delicate and important discretion to exercise, with reference to trials at the Commissions and Assize Courts especially; and we have no more power to control the Magistrates in this branch of their discretionary power than in any other. There is no appeal to us from their exercise of this discretion. Their determination is final and conclusive. If it be a corrupt one, there is a remedy by a criminal information against the guilty parties; but if their decision be honestly erroneous, their error is without remedy. It has been suggested that the Magistrates are judicial in revising the collectors' lists, and merely ministerial in making out the general list. I apprehend that is a mistake. They are not acting (to speak correctly) judicially in either duty, but they are exercising equally a discretion in both branches of their duty. The 35th section of the Jury Act throws considerable light upon the subject, showing us how far, and in what cases, and by what process (and what process only), the jurors' books can be amended. That section subjects the collector to a fine for any *wilful* wrong insertion or omission in the collectors' lists, this fine to be recovered before a Magistrate, upon conviction of the collector. The Magistrate is to certify to the Clerk of the Peace the conviction under his hand and seal; the Clerk of the Peace is then to correct the general list, and to give notice to the Sheriff; and thereupon the Sheriff is to amend the jurors' book. But the Justices at Sessions (or the Recorder) have nothing to do with

these corrections, and they are subject to no penalties. The law will not presume that the Justices would wilfully mis-exercise their functions, and therefore there is no provision for such a case. Here, then, we see that the jurors' book is only to be amended in cases of WILFUL wrong insertions or omissions; and that only by the fault of the collectors; and that the amendment cannot take place at all until after a conviction of the wilful offender. And indeed, if such a power as that claimed for this Court over the jurors' book be vested in us, I see not upon what ground a similar power for a similar purpose can be withheld from the Court of Common Pleas or the Court of Exchequer, after a trial at bar, or any other trial, in one of those Courts; but, in truth, this question has been twice solemnly decided by this Court, in this very cause; first, before the trial, we unanimously refused to quash the panel, and to grant a *mandamus* to the Recorder to amend the general list. That motion was founded on precisely the same grounds as those now pressed upon us; secondly, this objection amounts to a challenge to the array; that challenge the defendants took at the trial, and, upon demurrer, the challenge was disallowed. That challenge is of course on the record; and if the Court decided wrong, the defendants will have the benefit of it by writ of error.

One mode there is by which (if the defendants really felt the jurors' book of the city of Dublin to be framed so as to prejudice their defence) the defendants might have had a trial by a Jury taken from a quarter upon which no impeachment has been cast: that mode was (for some reason or other) passed by. The defendants might have moved to have had the case tried by a Jury of the county of Dublin, although the bills were found in the city of Dublin. This they might have done under the statutes of the 6 G. 4, c. 51, s. 2, and the 3 & 4 W. 4, c. 91, s. 31. They could thus have had a trial by a county of Dublin Jury, and that course would not have delayed the trial an hour. Why was not that easy and obvious course pursued? Even at common law, without any statutory aid, upon satisfying the Court that they were not likely to have a fair trial in the city of Dublin, the Court would have changed the venue to the county of Dublin, or some other county, as was done on the defendant's motion in *Res v. Hunt*. On all these grounds, therefore, I am clearly of opinion, that we cannot set aside the verdict upon this objection to the constitution of the Jury.

Sixthly, it has been argued, that illegal evidence was received and read against the defendants. The evidence objected to is the paper which has been called the Mullaghmast ballad: I so call it, because that name has been given to it on both sides, though somewhat inaccurately. This objection was, at the trial, the subject of protracted argument, and was solemnly ruled by the Court. But if, on further consideration, we should

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be now of opinion that the evidence ought to have been rejected, then this verdict should be set aside. For my own part, upon a thorough reconsideration of the subject, I am of opinion that the evidence was properly admitted; and I am disposed substantially to abide by the judgment which the printed report ascribes to me on this point, though perhaps my meaning may not have been as fully expressed as it might have been, and therefore liable to be misunderstood or misinterpreted, as it certainly was, by the learned Counsel who opened this motion.

The indictment here charges the defendants with a conspiracy (*inter alia*) to cause the Queen's subjects to meet in unlawful and seditious assemblies, and thereby to intimidate the Government, and procure changes in the laws and constitution of this realm; and one of the overt acts laid in the indictment is the meeting at Mullaghmast. The character, therefore, of this meeting at Mullaghmast became a legitimate subject of inquiry, and the Crown had the right to lay before the Jury evidence to show the illegality of that meeting. One of the pieces of evidence offered for this purpose was the Mullaghmast ballad. Now, there were two points of view in which such a document might be offered as evidence against the defendants.

First, it might be offered as evidence of a conspiracy; but to make it admissible in that point of view, there should be some evidence to go to the Jury that the traversers were connected in privity with the document. I will assume there was none.

But, secondly—it might be offered as evidence of the character of the assembly; and in that point of view to make it admissible, it would not be necessary to connect the defendants personally with the document; and supposing the defendants (or those of them on the platform at Mullaghmast rather) to be individually ignorant of this ballad, yet if it was part of the *res gesta* of the meeting, growing out of it, or leading to it, and forming a characteristic feature of it, the document was properly received, and left to the Jury. Upon this principle it was that, in the case of *Redford v. Birley* (a), in order to show the character of the Manchester meeting, which some of the pleas in that case averred to be an unlawful meeting, evidence was received of the acts, and declarations of persons, done and made at places some miles from Manchester, and on the day before the Manchester meeting, although the plaintiff was not shown to be otherwise connected with these persons than by taking a part in the meeting itself. These acts and declarations were, however, all in pursuance of a common object. And if persons will attend an unlawful meeting, though from mere curiosity, yet they appear thereby to countenance the meeting, and, in the language of Mr. Justice Holroyd, (p. 106), "If making that appear they are called upon by the law to answer

(a) 3 Stark. N. P. C. 87.

for their misconduct, it is incumbent on them to explain their acts, it may put them to some hazard or difficulties in showing their innocent intention." Several of the defendants were not only in attendance upon this meeting at Mallaghmast, but took a leading part in the assembling and conduct of it; and if their intentions were innocent, and there was laid before the Jury any evidence to show that the meeting was illegal, it lay upon them, by evidence, to disconnect themselves from the illegality. This seditious publication hawked about the meeting, and and sold in thousands, and informing the people there assembled of the historical recollections associated with the place chosen for that very reason for the meeting, and communicating to the remotest parts of that vast assemblage the same topics and sentiments which the leader of the meeting was on the same day communicating to that portion of them who were near enough to hear him speak, was truly characteristic of the meeting itself, and pregnant evidence of the objects of their so meeting at that place. I am, therefore, clearly of opinion that this Mullaghmast ballad was properly received in evidence.

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The seventh objection is, "That the verdict was against the evidence, or the weight of evidence;" some of the defendants' Counsel contending that there was no evidence before the Jury of the conspiracy charged by this indictment. This is an important fact of the case, and deserves to be considered. In conspiracy, as in other cases, the proof of the crime may be either direct or circumstantial, *i. e.*, conspiracy may be established either by express evidence of the fact of a previous concert or agreement, or it may be inferred from acts and circumstances. In the present case, there is no direct evidence of any agreement between the defendants, or any of them, to effect any of the purposes charged by the indictment. The evidence is entirely circumstantial, and the conspiracy, if any, must be inferred from the acts and declarations of the parties, and the attending circumstances. In order to bring home the charge of conspiracy to the defendants, it was incumbent on the Crown to establish two positions, *i. e.*, to give evidence in support of them: first, that such a conspiracy as that charged by the indictment actually had existence; and, secondly, to show against each of the traversers that he was connected with that existing conspiracy.

First, then, is there, in this case, evidence to go to a Jury, of the existence of a conspiracy, as charged by the present indictment? I think there is; and as much has been said to bring this matter into doubt, I shall shortly advert to the heads of the evidence upon which the proof of the conspiracy is rested. First, there is evidence that all the defendants are members of the Repeal Association, which holds its meetings at the Corn Exchange, Dublin. Now, it is not averred by the indictment, nor is it found by the Jury, that the Repeal Association is, in itself, an illegal body, nor was it urged in argument that the

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defendants, merely as members of that Association, were therefore obnoxious to the charge of conspiracy. But it was contended that the existence of that body, its acts and objects, and the defendants' connection with it and them, were matters important to lay before the Jury, with a view to this question of conspiracy; and in that I agree with the Counsel for the Crown. I cannot, therefore, pronounce the Repeal Association to be an illegal body. But let me not be mistaken. Let me not be supposed to say that it is a legal body. I pronounce not on that subject one way or the other. But this much I will say, that it is a body of most anomalous—I was going to say of a most dangerous kind, and seems to be scarcely reconcilable with the independent action of an established Government. This Repeal Association is a voluntary body: it holds its sittings continually in the city of Dublin. It does not assume to represent the people or any portion of the people, but it affects to represent the public mind of the people of Ireland, and accordingly it calls itself the National Repeal Association. It has its treasury and its revenues. It receives contributions to a large extent from Ireland, England, and America. It has millions enrolled in its service, all volunteers, but all professing and practising entire submission to its dictates or advice. This body has its leader, exercising unbounded influence over its acts, its operations, and its members. It has its organised staff in every parish in Ireland, all communicating with the head office at the Corn Exchange in Dublin. These officers are of different grades and names, all acting in concert, and all taking their directions from the Association in Dublin. These are all described as voluntary agents; but the result has been to introduce an organisation as complete, an unity of action and celerity of movement as entire, as if the whole were the result of an authorised executive power: and this has been made the subject of boast and congratulation. At the Dublin meetings their proceedings assume the form of the parliamentary model: there are debates, though without any difference of opinion; there are committees; there are reports; there are resolutions; there are addresses and proclamations and adjournments. This body sits in judgment upon the Houses of Parliament, and upon the measures there introduced and discussed; upon the acts of the Crown and of the Government; upon public men, and upon private men too: it pronounces its censures upon the laws and constitution as existing; it receives addresses, considers and undertakes to redress grievances; and it advocates publicly, and urges continually upon the masses of the people, great and important changes in the laws and constitution of the realm—changes which ought to be made, and *must* be made. Some of the speeches delivered at that Association, and some of their published acts and reports, as we have had them in evidence, are fraught with seditious and libellous matter. They have also their press: they have

their repeal newspapers, with suitable machinery for their circulation, to impress their doctrines upon every locality in Ireland. They use names significant of their power, as well as the existence of some great end which is the ultimate object of their Association. Their leader is called the Liberator of Ireland. They have their chief and subordinate pacificators, their repeal wardens, their inspectors, their collectors, their volunteers, their associates and members; and it wanted not even the semblance of providing for the administration of justice, to give to this body, in the eyes of the people, all the attributes of sovereignty. In fact, it is impossible not to see, in all this machinery and discipline (voluntary as it appears to be), the elements of a government, with its executive, their legislative, their judicial and their fiscal functions, ready framed, if they were so disposed, upon a sudden emergency to assume the reins of power, and to relieve the present Government from all their duties, so far as Ireland is concerned.

Such a body as I have described, I do not pronounce to be an illegal association, but for the reasons I have mentioned, I cannot say that it is a legal or constitutional body. But I feel myself called upon to say, that the being members of such an Association was evidence to be left to the Jury, *inter alia*, of the intentions and objects of these defendants, in their acts and declarations, as now in proof before us. It cannot be unimportant that the defendants, or some of them, wielded the great powers of this body according to their irresponsible will, and stamped a unity of purpose and action upon it, which was the echo of their own mind. That all the defendants, as members of this body, were combined together for a common purpose, has not been denied upon this trial by any of them. They glory in their being leading members of the National Repeal Association, and in their being parties to a combination to effect a repeal of the Union. The matter in difference between them and the Attorney-General is not the existence or non-existence of a combination to which they are parties; but it is as to the legality or criminality of that combination. The Attorney-General says, "You have combined to effect the repeal of the Union, and other changes in the laws and constitution of the realm, *by criminal means*." The defendants say, "We have combined to effect the repeal of the Union, and to procure other wholesome changes in the laws of this realm, not by criminal, but by legal and constitutional means." "The means contemplated by you," says the Attorney-General, "are, by creating disaffection, by exciting animosity between the Queen's subjects of Ireland and those of England; by exciting disaffection in the Queen's army; by procuring the Queen's subjects to assemble in vast multitudes, and thereby producing intimidation; by the publication of seditious songs, speeches and newspapers; and by bringing into discredit and disrepute the legal tribunals of the country." The defendants say, on the other hand, that the only

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means they contemplated or intended were the confessedly legal means of procuring petitions to the Crown and Houses of Parliament, by free and full discussion of the merits of the repeal question; and by meetings, addresses, speeches and publications, calculated to make as many converts as possible to their doctrines, and thus procure a moral exhibition of the national opinion upon the great question of repeal. This is plainly a question of intention, only to be deduced from the acts and declarations of the parties. It is emphatically a Jury question. And the first piece of evidence from which this intention is to be deduced, the one way or the other, is the existence of this Association, its acts and declarations; and the fact that the defendants are members of it, and have used its agency to carry out their great object; with what intention, and by what means, was a question for the Jury; and without saying that there is any ground for calling the Repeal Association an illegal combination (that question is not before us), I think the acts of that body, of which the defendants are all members, and which is itself but an instrument in their hands, is important evidence to be considered by the Jury, in ascertaining the object and intentions of the defendants, in the several acts and declarations charged against them by the Crown.

Now, with reference to this important matter, there are, *inter alia*, the following acts of the Association given in evidence upon this trial, and before the Jury for their consideration:—

First—The instructions to the repeal wardens; a document full of meaning.

Secondly—The cards belonging to the different classes of associators, with the authorised explanation of the green card.

Thirdly—The plan for the renewed action of the Irish Parliament.

Fourthly—The advertisement for the meeting at Mullaghmast.

Fifthly—The programme of the cavalcade for the Clontarf meeting.

Sixthly and lastly, and not the least important—The address of the Association to all the subjects of the British Crown, of the 13th of September 1843.

This last is, indeed, a pregnant piece of evidence upon one branch of the conspiracy charged.

Now all these are *joint* acts of the defendants (except Tierney), done by them in combination for the purpose of procuring a repeal of the Union; they are acts done by them in pursuance of a common plan for a common purpose; what the intentions of the parties to these documents were, and what the means which they suggest to carry out their object were, were matters for the Jury. Again, the assembling of what have been justly called monster meetings, on the various days between the month of March and the month of October, in the year 1843, is the act of the Association—or rather of those who use the Association as their instrument; and the defendants—with two exceptions (Duffy and

Tierney) have been the principal actors at, and promoters of, these meetings. These are also joint acts; whether those documents were published, and these monster proceedings were adopted, with the views suggested by the defendants or those suggested by the Attorney-General, was a question for the Jury; but that these documents and proceedings furnished no evidence from which a Jury might infer a preconcerted intention in the framers and promoters of them to produce discontent and disaffection, and to overawe the Government into compliance with their demands, nobody has contended, and I think, nobody can successfully contend. When, therefore, it is said the conspiracy should be shown before the act of one defendant can be evidence against another defendant, to that I accede; but when it is further pressed that the argument in support of the Crown case of conspiracy is a mere argument in a circle—for that individual acts are first used to show separate criminality in the different defendants—and then the Jury are called on without any previous evidence of concert to use these separate acts as evidence of a conspiracy between all the defendants: to this I cannot accede: the position is wrong in point of fact, and it is not quite tenable in point of law; for first, I have shown that there were joint acts of six at least out of the eight defendants, from whence it was open to the Jury to infer the existence of the conspiracy charged in some or all of its branches. This ground being laid, it is admitted on all hands that the separate acts of the six, so connected and done in pursuance of the common criminal purpose, are legal evidence against all the members of the conspiracy. To let in these separate acts as evidence against others, the pre-existing criminal concert must be shown,—a pre-existent concert, not necessarily in the order of time, but in contemplation of law. But in point of law also, the defendants' argument is inaccurate. It is possible to establish a conspiracy without the evidence of any meeting or agreement of the parties, and even without the proof of any joint act done by the conspirators. See Mr. Justice Coleridge's observations in *Rex v. Murphy* (a).

But I need not dwell upon these distinctions, because in this case there are clearly many joint acts of six at least of the defendants—in some of them a seventh is joined—which contains evidence to go to a Jury, of the general conspiracy as charged. But it may be said the Loyal National Repeal Association is not charged with being an illegal body; its acts therefore cannot be evidence of a conspiracy between certain of its members. I believe there are thousands in that Association who have not the least idea of committing, or desiring to commit a breach of the law. I have no doubt there are many loyal subjects amongst them. I will not either dispute the title "Loyal," which at one period it was

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(a) 9 C. & P. 310.

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thought right to prefix to the name of the body. But in passing, I may be allowed to intimate, that attachment to the person of the reigning Sovereign does not complete the idea of loyalty. That comprehensive term includes within its meaning, not only affection to the person, but also to the office of the King ; not only attachment to royalty, but as the word itself imports, attachment to the *law* and the constitution of the realm ; and he who would by force or by fraud endeavour to prostrate that law and constitution (though he may retain his affection for its head), can boast but an imperfect and spurious species of loyalty. But, not questioning the intentions of many of the members of the Repeal Association, we are to recollect that the Association itself is but an instrument in the hands of certain of the defendants ; and it was therefore an important consideration for the Jury, whether the leaders of that Association, really and *bonâ fide*, intended to make use only of legal means to effect their common object, as was the anxiously published profession of that body ; or whether the seditious and libellous address of the 13th of September 1843, issued in the name of the Association, as well as the other documents to which I have referred, do not show that it was intended under the cover of constitutional professions, actually to excite the masses of the Irish people to deadly hostility against England, and to create disaffection to the existing Government and Legislature. But in addition to these documents, there were before the Jury, the acts and declarations of six of these defendants at all or some of these monstrous exhibitions of popular force (whether moral or physical), still using the name of the Association, still professing obedience to the law, but still acting together for the common object, and assembling and agitating these enormous masses for that common object. Surely it was a question for the Jury, whether these multitudes so assembled and agitated, were so assembled and agitated merely for the purposes of petition, of discussion, and moral exhibition of the Irish mind ; or whether they were not thus assembled and addressed by these defendants, in aid of the common purpose, to exhibit not merely moral, but overpowering physical force—force not to be used for violence or outrage—but force to be demonstrated in order to intimidate the Government, and thereby compel a repeal of the Union. I think, therefore, there was abundant evidence to go to a Jury of a conspiracy between several of the defendants, without adverting to their separate acts and declarations.

But, secondly—it is urged in this part of the case, that there was not evidence to connect the several defendants with the alleged conspiracy ; the acts of each, if evidence at all upon this indictment, being only evidence against himself, and not against the other defendants. This position assumes, that independent of the separate acts of each defendant, there was not evidence to go to a Jury of the existence of a conspiracy,

as charged by the indictment. That position I have already disposed of, as to *six* at least of the defendants, against whom I have shown that there were in evidence before the Jury, joint acts, from which a Jury might reasonably infer the conspiracy charged.

There remain two other defendants whose cases are said to be somewhat different—Duffy and Tierney; and first, as to Duffy, he was, during the year 1843, a member of the Association, and *prima facie* answerable for all the public acts of that body; and though he did not attend any of the monster meetings, it is clear that his journal formed part of the machinery of the Association; and it is equally clear, from the different publications of his which have been read in evidence, that with great zeal and ability he promoted, approved, and circulated the acts and proceedings of many of those meetings; and his very clever paper appears to have been the chief member of that repeal press, which was one of the most powerful and influential auxiliaries of the Repeal Association, and was zealously engaged in exciting the repeal agitation, and by the same seditious instrumentality. It was, no doubt, argued that there was not legal evidence before the Jury that Duffy was proprietor of the *Nation* newspaper; but the answer to that argument is, that the objection to the sufficiency of the evidence was made at the trial; it was met by the Crown, and the objection was overruled by the Court, and Duffy's distinguished Counsel, not remarkable for relinquishing even the minutest atom of his client's rights, so far from protesting at the time against the rule of the Court, seems to have entirely acquiesced in it; for he commenced his very able and eloquent speech by saying that he was Counsel for Mr. Duffy, the proprietor of the *Nation*; but, indeed, as has since been shown, there is upon our notes of the trial abundant evidence of such proprietorship in Duffy, and as a matter of fact, no doubt whatever is entertained by any body on the subject.

As to Tierney, his case is quite peculiar, and it has accordingly been placed upon peculiar and separate grounds. Tierney did not join the Association until the 3rd of October 1843, after all the overt acts, save one, to establish the conspiracy, had been done and concluded; but on that 3rd of October he made a very violent and seditious speech at the Association,—that speech is laid as an overt act of the existing conspiracy—and these two facts are practically the only evidence to affect Tierney in this case. The Jury have certainly given in a most discriminating verdict, and they have acquitted Tierney of every branch of the conspiracy, save that of exciting disaffection amongst the Queen's subjects and endeavouring to promote hostility and animosity in the minds of the Irish people toward their fellow-subjects of Great Britain. I do not question that by a single act a man may be made answerable for a conspiracy, of the existence or objects of which (up to the time of the act proved) there is no express or extrinsic evidence that he was aware.

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Suppose the case of a conspiracy between A. and B. to burn a house at a particular place, and on a particular night, and suppose C. to be found putting a lighted candle to the thatch of the house at the appointed time; the fire is prevented, but A., B. and C. are indicted for the conspiracy; evidence of the plot is given against A. and B., and the fact I have stated is proved against C.; can any man say, that upon such a state of facts there is not evidence of C. having joined in the conspiracy with A. and B.? I have put a strong case. But as to Tierney the case stands thus: there are but two facts upon which the verdict against him can be rested; for the transaction at Clontibret was put out of the case by the charge; and assuming here, as I must do, that there was the pre-existing conspiracy, let us examine these two facts, and see how far they are sufficient to connect Tierney with the conspiracy. First—Tierney on the 3rd of October 1843, became a member of the Repeal Association, and brought into its treasury a sum of £90, the contribution of his parish of Clontibret. Secondly—he made a speech on that same day at the Association—the speech which is set out in the indictment.

I have already stated that the Attorney-General, although he does not admit the legality of the Repeal Association, yet he does not prosecute the defendants merely for being members of that body. The fact, therefore, of Tierney becoming, on the 3rd of October 1843, a member of the Repeal Association, cannot, taken alone, be now held to be a sufficient ground for the verdict. This brings me to the speech made by him on the 3rd of October:—was that speech alone, or coupled with his so becoming a member, and so contributing to its funds, evidence of his having joined the branch of the conspiracy to which I have referred? The speech is certainly a very seditious speech; it shows the orator to be an ardent repealer—an admirer of the head of the repeal movement—an approver of the progress of repeal during the year 1843, and of the effects produced by the previous monster meetings; and further, it handles topics, and excites to disaffection and to hatred of the Saxon race, in a manner which shows entire union of sentiment with the other defendants. On the subject matter of the charge particularly affecting Tierney, I will not therefore say that there was no evidence in the case to affect him, but I think it was slight evidence, and I certainly did think that the Jury would have acquitted him. I will not either say that there has been misdirection as to him, but I could also have wished that the direction of the Court as to Tierney had been more explicit than it was. I should have wished that the Jury were called upon pointedly to consider whether he was, on the 3rd of October, aware of the existence of the conspiracy which he is found to have joined, and that the distinction between his case and that of the other traversers had been more fully pointed out to them. The Jury, have, however, found Tierney guilty; and they have thereby, from the evidence to which I have adverted,

drawn the conclusion that Tierney was aware of the conspiracy—that he adopted its object and means—and that his speech was an overt act of that conspiracy. For my own part, were I one of the Jury, I should probably not have arrived at the same conclusion, upon that feeling only I would not act; but I agree with the doctrine laid down by Lord Ellenborough in *Rex v. Pollman* (a), “That to affect a party with the charge of “a conspiracy, entered into by other persons, it must appear to the Court “that he was cognizant of the object of the conspiracy, and the mode “stated in the indictment by which it was to be effected.” Was the defendant Tierney, in this case, aware of the conspiracy, and the mode in which it was to be effected, when he made his speech on the 3rd of October; or was he only aware of the general objects of the Repeal Association, as by that body publicly professed? Was his speech an overt act of the existing conspiracy, or was it an individual act unconnected with any existing criminal plan or design? I confess my mind is not satisfied upon this subject; I do not feel satisfied that injustice may not have been done to Tierney; and therefore, so far as he is concerned, and if his case stood alone, I should be disposed to call for a second trial; and as it is, although I am satisfied with the verdict as to all the other defendants, unless some mode be adopted of relieving Tierney from the pressure of this verdict, I should be of opinion that there ought to be a new trial generally for that purpose. But it is in the power of the Attorney-General to remove all difficulty from this part of the case, by entering a *noli prosequi* as to Tierney alone. (*See Russ. & Ry. C. C., Rex v. Hempstead & Hudson*, 344).

I am therefore clearly of opinion (setting aside the case of Tierney), that the verdict in the present case is not a verdict against the evidence, nor a verdict against the weight of evidence; in truth, if there was evidence to go to the Jury (as I think there was cogent evidence), it could scarcely be against the weight of the evidence; since, except some not very important matters, no evidence was given on the defendants’ part.

The eighth and last objection necessary for me to notice, is that which complains of misdirection; and on this point I must premise, that the charge is to be considered not merely as the charge of the Chief Justice, but also as the charge of the Court. All the Judges might have consecutively charged the Jury; but in this instance they deputed their powers to the head of the Court, following a course by no means unusual upon occasions like the present, when the Judges are unanimous in their opinion as to the legal directions to be given to the Jury, and the issues which should be left to them to try. In thus calling the charge so delivered by the Chief Justice, the charge of the Court, I cannot be understood to mean that each sentence, phrase and sentiment in the charge, belongs to all the Judges. No two men could

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be found who could charge the Jury upon any case of any importance, in the same terms, or with exactly the same views of the relative bearing and importance of the different parts of the evidence; but for the substance of the charge—the legal grounds upon which the case is rested, the directions in point of law, and the legal effect of the evidence as bearing upon the issues to be tried, I hold each Judge of the Court to be as responsible as my Lord Chief Justice himself is.

Misdirection is imputed to the charge in two ways:—first, misdirection in point of law, by which I understand the laying down of legal positions for the guidance of the Jury, which were not warranted by the law; and secondly, misdirection as to the effect of the evidence laid before the Jury.

Now, as to misdirection generally. No objection was made to the charge during its delivery nor at its close; not one of the legal positions laid down by the Court was then controverted, nor is any one of them even now directly controverted. There has been an unusual length of time occupied in discussing this motion, and there has been no abstinence of censure on the part of the learned Counsel for the defendants; but none of them have in terms questioned any of the legal propositions laid down for the guidance of the Jury. The learned Counsel who at the trial was Counsel for Duffy, and who opened this motion as Counsel for O'Connell, and the learned Counsel for Gray, did indeed occupy much of their time in complaining of and criticising the charge; they complained that in some places the charge was too full, in other parts it was not sufficiently explicit; that the Chief Justice dwelt too much upon the evidence for the Crown, and too little on the evidence for the defendants; that though he left all the questions to the Jury, yet he strongly conveyed to them his own opinion; and one of the learned Counsel in maintaining these criticisms, by an ingenious process of dissection applied to the body of the charge, by taking a sentence here and part of a sentence there, detaching what was conjoined, and bringing together what was separate, was enabled to make a charge for the Court, as like to what thich was actually delivered, as the entire subject may be to the dissected parts brought together in this arbitrary way; but it is only to read this charge with common sense and common fairness from beginning to end, and then it will be seen that the learned Counsel has deceived himself and much misrepresented, no doubt unintentionally, the meaning of the Court; I say unintentionally, because I know the candid, warm, and ingenuous nature of the learned Counsel would not condescend to wilful mirepresentation. Many observations also, more critical than substantial, were made upon the terms of this charge; some of these were refuted at the moment, many of them require no answer. The Court was also taught, not only what was defective in the present charge, but what in other hands it should have been; and we had pro-

duced to us, by way of contrast and as a model charge for all Judges upon all occasions, a M.S. charge delivered by the late eminent Sir John Bailey, in the case of *Rex v. Hunt*—a charge, I have no doubt, excellent for its purposes; but had the same learned Counsel been retained to criticise Judge Bailey's charge, instead of that now under consideration, his fervid ingenuity would perhaps have detected as many defects and redundancies there as he has done on the present occasion. But this Procrustean argument, which would cut down or extend the minds and tastes and temperaments of all men to the one standard, will no more bear the test of authority, than it does of common sense. Some eminent Judges have felt themselves bound, in certain cases, to give to the Jury the opinion of the Court upon the merits of the case then before them. Such was the habit of Lord Ellenborough and of Lord Kenyon. Numerous authorities have been cited to show this, and many more there are. The practice of some eminent Judges has been merely to sum up the evidence, without expressing any opinion upon the facts. But it never yet was held, nor, before this motion, perhaps contended, that the presiding Judge or Judges were not at liberty to exercise their discretion upon the subject, and to assist the Jury in matters of fact, if they thought the case called for such assistance; and I can conceive nothing more likely to prejudice the administration of justice through the medium of jury trials, than the doctrine that the Judge was to act the part of a mere reporter, and to be precluded from assisting the Jury in matters of fact, as well as guiding them in matters of law. No doubt, this assistance will be given with discretion, and in due proportion to the circumstances of the particular case, and with the caution given to the Jury by the Chief Justice upon the present trial, "That it was their exclusive province to determine all matters of fact, and to draw their own conclusions from the evidence." There are many authorities on this point, but I shall refer to one only, *Simpson v. Clayton* (a); Chief Justice Tindal, a great authority, thus expresses himself: "I have heard of no misdirection from the learned Judge, or that any improper evidence was admitted; but the objection is, that the Judge expressed his opinion to the Jury as to the weight of evidence given for the plaintiff. But this he was bound to do; and he only stated an opinion as if he was on the Jury, and they were to follow it or not, as they thought fit." The Chief Justice goes on to say, "*The Attorney-General v. Good* (b) furnishes an authority on this point. There Mr. Baron Hullock said, 'The only ground remaining is, that too great effect was given to the evidence in the learned Judge's direction.' I apprehend that that would be a new ground for granting another trial, and would open a door to appli-

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(a) 1 Hodg. Rep. Com. Pl., 464.

(b) M'C. & Y. 286.

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"cations for that purpose to an extent incalculable. I am at a loss to know by what rule the precise quantum of force which should be attached by a Judge to a particular piece of evidence on a trial is to be measured." Whether a Judge therefore shall give to a Jury, upon a trial, his opinion upon the weight of the evidence, or any part of the evidence, is entirely matter of discretion. Had the defendants' Counsel been able to show that the opinion of the Chief Justice, as appearing upon the charge, was an erroneous one, and had misled, or was calculated to mislead the Jury, the case would have been widely different from the present one; but in that the defendants' Counsel altogether failed.

One other criticism imputing misdirection, I shall notice here—and though much dwelt upon, and very plausibly put to the Court, it is after all but a piece of ingenious sophistry. It was imputed to the charge, that the attention of the Jury was not called (as it should have been explicitly) to the doctrine that they must be satisfied of the existence of a conspiracy, before they could receive the evidence of an act done by one of the defendants, against the others. Now, I would refer to pages 812 and 813 of the printed report, in answer to this objection:—

"Gentlemen, in order to convict the traversers, or any of them, of the charge of conspiracy, it is necessary that you should be satisfied (I do not mean that you should have ground to surmise, but that you should have such evidence before you as to convince your consciences), that they, or some of them, did respectively and in common, combine or agree to do an unlawful act; whether that act be unlawful in itself in its original design, or whether it became so by the unlawful means by which it was agreed that it should be brought about. That is one observation.

"Another observation is this: that to constitute the crime of conspiracy, it is not necessary that the unlawful thing agreed to be done should be effected. The crime of conspiracy is complete, though in point of fact, the criminal end was never attained.

"Another point I would lay down would be this: that if you be satisfied that an unlawful agreement has taken place, of the nature that I have stated, either to do an act unlawful in itself, or to cause that to be done by unlawful means, though the act itself *per se* should not be criminal—if you be once satisfied that such an agreement, a criminal agreement, has taken place, from thenceforward the acts of each one associating in this conspiracy are reciprocally evidence against the other of them, if conducive to the same criminal end, though it be not proved that each and all of the several conspirators have either participated in each individual act, or although it be not proved that each and every of the several parties charged with the conspiracy have been guilty of the perpetration of any particular act towards the common end, the illegal end."

"Now, Gentlemen of the Jury, the crime imputed commenced in 1843. Mr. O'Connell and the traversers say generally, that they had a legal purpose in their Association to procure a repeal of the Union, in such ways as they say the law and the constitution warrant. Mr. Solicitor General says—Up to 1843, I do not deny the proposition that you advance; the Act of the Union is what you consider to be a grievance of a grave character, and you have a right, by freedom of discussion, by petitions to the Crown, by petitions to Parliament, by every other legal and constitutional way, to endeavour to relieve yourselves from those grievances, or supposed grievances, and thereby so to procure a repeal of the Union. They at the other side say they require no more; and what they profess and state they were doing was, to follow those means which the law allowed, and thereby to procure a repeal of the Union. In 1843, the beginning of that year, the Crown says a great change took place in the affairs of the Repeal Association, and Mr. O'Connell at their head; and from thenceforth, whatever may have been their antecedent proceedings, of which he says nothing, from thenceforth the means by which they attempted to effect the repeal of the Union, if that were their object, became illegal. Now, Gentlemen, it lies upon the Crown to maintain that proposition; it lies upon the Crown to maintain it, and support in evidence to your satisfaction, that from some time in 1843, such a conspiracy as has been charged in the indictment existed—the precise time, or day, or place is not material. Mr. O'Connell said he was deprived of the means of proving an *alibi*—why, it is not necessary; he has had notice of the facts imputed to him, he has had a bill of particulars, and he has had overt acts stated upon the face of the indictment; but without proving a direct time or place in which a direct illegal agreement was concocted between two or more of the traversers, it is for you to say, are you satisfied upon the facts laid before you, that though the actual time of the conspiracy is not proved, yet that such a conspiracy as is imputed must have taken place, from the facts that are admitted, or proved, coming from one or more different parties charged with this conspiracy, and in furtherance of the common design. The *onus* of that lies upon the Crown; and, gentlemen, you must be satisfied that the guilt which is so imputed, has been proved; that is, that satisfactory evidence is given to you of the existence of the alleged conspiracy, the alleged compact, the alleged agreement and common design between the several traversers, or some of them; and if you are not satisfied by them, I am bound to say, gentlemen, if that is not made out to your minds, so as to leave it above and beyond reasonable doubt upon the subject, it will be your duty not to convict upon presumption; you are to convict only upon satisfactory proof, either direct or inferential. The *onus* is on the Crown; and that is another reason why I pass over without more particular detail

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"the evidence given on behalf of the traversers. Gentlemen of the Jury, "the nature of the proof given by the Crown is this; it will be for you "to say, are you satisfied or are you not, with the way in which the "Crown has proved its case."

The mere reading of these passages continuously, is sufficient to refute the imputation. Another imputation on the charge (though perhaps not quite in order here), I shall also notice. It was said that the Chief Justice stated minutely the evidence for the Crown, but passed over that for the defendants in silence, or slightly touched it, and pronounced it to be irrelevant, and thereby virtually took it entirely from the Jury. Now, this I must say is a monstrous mistake. The evidence on the defendants' part (with a slight exception) consisted of speeches, addresses, and articles read from newspapers; those the Chief Justice did not state in detail. Why? Because he gave the full force and effect of them to the Jury; he stated the results of them, in favour of the defendants, as documents, about the meaning of which there could be no doubt. But he stated in detail the documents relied upon by the Crown. Why? Because the *onus* of proof lay upon the Crown. The Crown was bound to show a criminal intention; the question was one of intention, and the effect and results of these documents was for the Jury, who were to infer from them an innocent or a criminal intent. The meaning and intent of these documents was the very matter in dispute; as to the meaning and intent of the documents relied on by the defendants, the very effect and meaning attributed to them by the charge was that which the defendants' Counsel themselves had put upon them. They were all, however, left expressly to the Jury; and if the Chief Justice said they were irrelevant to the purpose for which they were read, he pronounced only an opinion, and I presume to say a just opinion, as to the force of the argument deduced from them; an opinion which amounts to nothing more than this, that a man's having innocent intentions in 1800 and 1810 was no answer to a charge of conspiracy, if established, in 1843; and this is what is called excluding from the Jury the evidence for the defendants. But enough has been said about those criticisms.

Secondly, it is urged on the defendants' part, that the Jury were misdirected as to the effect of the evidence; and several instances are pointed out, of such misdirection; there is, however, but one of these which seems to require any answer. It is contended, that although the newspapers given in evidence in this case were legitimately used as against their respective proprietors, yet, as against the other defendants, they were not evidence at all, or at least were only evidence to a certain extent, and that this distinction was not pointed out to the Jury in the charge. For example, it is said that the *Pilot* of the 14th June, 1843, though evidence against Barrett, is no evidence at all against O'Connell, or at least, that it is not evidence that he attended the meeting at Mallow,

or made the speech which that paper asserts he did make. Now, it appears to me, that this paper is as much evidence in this case against O'Connell as if he had himself authorised the publication of it. But first, is this an objection which ought now to be listened to? I think not.

Firstly—These newspapers were read without any such objection having been ever made.

Secondly—Passages in them were read as evidence on the traversers' part.

Thirdly—They were commented on by some of the traversers' Counsel as being in evidence.

Fourthly—The traversers themselves had recourse to evidence of the same description; the chief part of their evidence is of this class.

Fifthly—They allow the Solicitor-General, without even raising the objection, to comment on these papers.

Sixthly—They allow the Chief Justice, without any objection, to explain them and comment on them also.

It seems to me that this evidence was by mutual concession before the Jury, and that it is quite too late, and not quite fair now, to say that the Chief Justice should have told the Jury they were not evidence against any person but the proprietors.

But on principle, I think they were rightly received and acted on. My grounds for entertaining this opinion are these: for this part of the case, I assume that there was evidence to go to the Jury, of a conspiracy to the effect stated in the indictment, to which Barrett and O'Connell were parties, and that that evidence was independent of the newspapers. I assume again, that the paragraph (in the *Pilot*) relied upon by the Crown, was published by the defendant, Barrett, in pursuance of the pre-existing conspiracy; and I then apply to this publication the universally admitted rule applicable to this subject, that the act of one conspirator done in pursuance of the common object is evidence against his co-conspirators. This publication is the act of Barrett in the first instance; but being done (if done) in pursuance of the common design, it becomes, in contemplation of law, the act of all the co-conspirators. Upon this ground it was, that in *Hardy's case* (a), the letter of Martin, a conspirator, to Margarot, another conspirator, although the letter never reached the latter, and perhaps never was posted at all, and although it was partly narrative, yet being an act done by Martin in furtherance of the conspiracy, it was held to be evidence of the nature and extent of that conspiracy against all the co-conspirators. The writing of Martin was considered as an act done in furtherance of the conspiracy, on the principle that *scribere est agere*.

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In other classes of crime, as well as in conspiracy, where several persons engage together in a common criminal design, in the furtherance of that design the act of one is the act of all; and each, in the acts agreed to be done for the furtherance of the common design, makes every other of the conspirators his agent in the particular transaction. In the same case, p. 453, Thelwall's letter was rejected. Why? Because it was a mere narrative given by one of the conspirators to another person, and was not an act done in pursuance of the conspiracy. But whether narrative or direct incentive to conspiracy, if done in pursuance of the conspiracy by a conspirator, it is evidence against his fellows. A narrative may be as mischievous as any other species of writing—whether in prose or in verse, whether speech, narrative or song—if it be an act done in pursuance of the conspiracy, it is evidence against all the co-conspirators; and upon this ground, the very clever, exciting ode, called 1798, was read without objection from the *Nation* newspaper. That the newspaper of the defendant Barrett, therefore, was, in this instance, evidence against O'Connell, I entertain no doubt: and the same observation applies to the other newspapers similarly circumstanced, and to the other defendants. But it is again said, though it may be evidence against O'Connell of a conspiracy, and the nature and extent of the conspiracy, yet it is not evidence that he attended the meeting in the paper spoken of, or made the speech therein ascribed to him; and yet the charge tells the Jury, upon the evidence of this paper only, that O'Connell attended the meeting, and made the speech. This is not quite accurate in point of fact; for there is evidence enough in the case of O'Connell attending the meetings to which I am adverting. There are two, however, as to which the only evidence of his speeches are the reports in the repeal papers adverted to before; but taking it to be so, the objection is thus answered upon principle:—suppose there never was such a meeting, nor such a speech, the publication would not the less be evidence against O'Connell, if it were an act done by Barrett, in furtherance of the common design, and in that point of view it would be quite unimportant whether such a meeting took place, or such a speech was made at all. Suppose Barrett had (in pursuance of the common design) published in his paper a proclamation to the people of Ireland, signed Daniel O'Connell—a proclamation exciting the people to disaffection, and to hostile feelings towards the people of England; would not this proclamation, upon the assumption that Barrett and O'Connell were engaged in a conspiracy, by means of speeches and publications to excite such feelings in the Irish people, be clearly evidence against O'Connell, although no evidence should be given that the proclamation was his? Upon the assumption I have made, this act of publication by Barrett was equally an act of publication by O'Connell, and he is as much answerable for it, on the ground of conspiracy (though not of libel), as the publisher

himself is. The mistake upon which this objection rests is, that the publication is a mere confession or admission of the publisher. It is no such thing, it is a distinct act done in furtherance of the common design, according to preconcerted arrangement; and though primarily and properly the act of Barrett alone, it is, in contemplation of law, being an act done in furtherance of the conspiracy, the act of all the co-conspirators also. These observations, of course, I apply only to so much of the paper as is published to forward the objects of the conspiracy; the other parts of the paper cannot be evidence against any of the defendants. When, therefore, the Chief Justice, on the authority of this paper, told the Jury, that O'Connell attended the meeting, and made the speech therein ascribed to him, he only stated that which he was warranted in doing, since, supposing the existence of the conspiracy, and that Barrett and O'Connell were joint conspirators, the acts and declarations of one in pursuance of the common object are, in law, the acts and declarations of both, as much as the act of one member of a mercantile firm, done in the business of the firm, is the act of all the members of the firm.

I therefore think that the distinction attempted to be drawn between the purposes for which the newspaper was evidence against O'Connell, is one not found in the law of evidence; if evidence against him at all upon this trial, it must have its full effect as such, and in truth, the distinction is one utterly unimportant; for this evidence was resorted to not to show that O'Connell attended the meeting or made the speech, but to show the nature and extent of the conspiracy in which he was embarked. There is, therefore, no misdirection in this matter.

We were taught, in emphatic language, by one of the learned Counsel for the defendants, what were the duties of a Judge presiding at a criminal trial, and the duties of Counsel were also dwelt upon: and then we were admonished, that by the law and constitution of this realm, the Judge was Counsel for the prisoner, and it would follow, was therefore bound not to express an opinion unfavourable to the prisoner. Now, I think there has been some confusion as to the Judge's position in this respect. The subject is an important one; and I will shortly state my view of it. It is true, the Judge is the prisoner's Counsel, and I add, he is also the Counsel for the Crown; but both these offices are subordinate to his higher functions as a dispenser of justice and an expounder of the law; and he is bound to administer that law equally and impartially to both sides. On this subject I adopt the language of Lord Kenyon, in summing up to the Jury, in the case of *Rex v. Wakefield (a)*. Mr. Wakefield had, in his defence, told the Jury that "he had slender expectations of indulgent interference from the Judge, though the law of the country regarded him as the prisoner's Counsel, but that all his hopes were concentrated in the Jury." "I have been reminded," says Lord Kenyon, "that

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"I sit here as Counsel for the defendant. I certainly do so, so far as to interpose between him and the Counsel for the prosecution, and to see that no improper use of the law is made against him, and that no improper evidence is given to the Jury. But, gentlemen, the Judge has another task to perform, which is, that of assisting the Jury in the administration of justice. Whether I have in this case betrayed my trust, I leave to you." Now, as the learned Counsel has been so good as to remind the Judges of their duties, I am sure he will not take it ill of me, if I remind him that he has taken rather a narrow view of the duties of Counsel upon a criminal trial. The learned Counsel said, the Advocate's first duty was to his client, the second to himself, and the third to the public. His client was entitled to all that the Counsel's zeal and ability could effect. He was bound to maintain his own independence with all due respect to the Bench, and he was bound to assert the rights and liberties of the public: and all these duties the Counsel in this case has, no doubt, ably discharged. Now, I do not quarrel with the learned Counsel that he casts all these duties upon the Counsel; but I do say, that the British Advocate has still higher duties to regard; his duties as a man and as a christian are paramount to all other considerations.

This Court in which we sit is a temple of justice; and the Advocate at the Bar, as well as the Judge upon the Bench, are equally ministers in that temple. The object of all equally should be the attainment of justice; now justice is only to be reached through the ascertainment of the truth, and the instrument which our law presents to us for the ascertainment of the truth or falsehood of a criminous charge is the trial by Jury; the trial is the process by which we endeavour to find out the truth. Slow and laborious, and perplexed and doubtful in its issue that pursuit often proves; but we are all—Judges, Jurors, Advocates and Attorneys—together concerned in this search for truth: the pursuit is a noble one, and those are honored who are the instruments engaged in it. The infirmity of human nature, and the strength of human passion, may lead us to take false views, and sometimes to embarrass and retard rather than to assist in attaining the great object; the temperament, the imagination and the feelings may all mislead us in the chase,—but let us never forget our high vocation as ministers of justice and interpreters of the law; let us never forget that the advancement of justice and the ascertainment of truth are higher objects and nobler results than any which in this place we can propose to ourselves. Let us never forget the christian maxim, "That we should not do evil that good may come of it." I would say to the Advocate upon this subject,—let your zeal be as warm as your heart's blood, but let it be tempered with discretion and with self-respect; let your independence be firm, uncompromising, but let it be chastened by personal humility; let your love of liberty amount to a passion, but let it not appear to be a cloak for maliciousness.

Another doctrine broached by another eminent Counsel I cannot pass by without a comment. That learned Counsel described the Advocate as the mere mouth-piece of his client; he told us that the speech of the Counsel was to be taken as that of the client; and thence seemed to conclude that the client *only* was answerable for its language and sentiments.

Such, I do conceive, is *not the office of an Advocate*. His office is a higher one. To consider him in that light is to degrade him. I would say of him as I would say of a member of the House of Commons—he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law—he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the Advocate of an individual, and *retained* and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual *retainer* on behalf of truth and justice; and there is no Crown or other license which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer.

This is a case of vast magnitude, involving deep and great interests, both public and private. It has called for and it has called forth the exertion of very great forensic powers. There has been exhibited during the progress of this protracted prosecution, as much of zeal, of eloquence, and of learning, as perhaps have distinguished any case; and if there have been more of the fierceness of party conflict, more of the spirit of combat, and less of consideration for the feelings of others, displayed upon this occasion than in the ordinary administration of justice in cases of ordinary dimensions, I would attribute it to the excitement of feeling and the exaltation of imagination, naturally, perhaps, growing out of the occasion, rather than to any wilful or reckless disregard of those higher moral and religious principles by which our legal career should always be guided and governed.

On the whole (except as to Tierney), I am clearly of opinion that the verdict in this case should stand.

BURTON, J.

The case, as it comes before us on the present application, has been argued so elaborately, and with so much exactness by my learned Brothers, and any difference between myself and them, or either of them, is so limited, on this day, that I shall but employ what remains of the public time, and best serve the interests of the parties concerned (the traversers and the public), by laying my views of the case before them

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upon the several points in discussion in a very compendious manner ; and in doing this, I shall consider the several points that have been made on the part of the traversers, not in the order in which they had been brought before us, but in that order in which they affect the trial, as it came before the Court.

The first objection made on the part of the traversers is to the extension of the trial (commencing in the Term) into the Vacation, under the provisions of the 3 & 4 W. 4, c. 31. I have only to say upon this point, that as it appears to me, that in what has been done in the present instance, there is nothing inconsistent with, or going beyond the words of the statute, nor do I see any inconvenience resulting from it ; and that if this should, notwithstanding, be a misconstruction of the statute, the objection may be made, and, in my judgment, would be most properly made, on a writ of error ; and, therefore, I see no reason, at least no necessity, for making it a ground for granting a new trial on motion.

The second objection, in order of time, seems to be that which has also been put upon the record by a challenge to the array, which challenge the Court (a majority of the Court) has disallowed, and the objection made by it, being upon the record, is yet open to the traversers upon a writ of error. This objection has been so copiously, and, to my judgment, so satisfactorily reasoned upon by my learned Brothers, that I need only say, that I fully concur with them in holding that it ought not to be considered as a ground for a new trial.

The third objection, in order of time, is that which relates to the person who appears to have been summoned and put upon the panel, and sworn by the name of John Rigby, his true name being John Jason Rigby, and he having, on being called on to be sworn, objected to being sworn on that ground ; no objection, however, appearing to have been made on the part of the traversers, or any of them, to his being sworn, but on the contrary, the Counsel for some or one of the traversers having expressed a desire that he should be sworn on the Jury—it being also clear that he was the person intended to be summoned, and entitled so to be, and that he was, and that without any objection, sworn by the name by which he was summoned, so that there is no variance in this respect on the record. It is, in my judgment, quite clear that this objection ought not to prevail.

The next point is, as to the question of venue. Upon this question also, I have only to say that I perfectly concur in the judgment of my learned Brothers.

The next point that I propose to consider (and which begins what is properly the trial of the traversers), is that which complains of the admission of evidence, which it is contended ought to have been rejected. And first, as to the admission of the paper, called the ballad of Mullaghmast, which appears to have been circulated in very great numbers on the

morning of the day on which the monster meeting at that place was held. The objection to the reception of this document is rested upon the fact of its not having been shown to have come to the hands of any of the traversers, or any person who there took an ostensible part with them; but I think it is clearly admissible on the ground of its showing the character of the meeting, and of its perfect accordance with the professed object (professed publicly at the meeting) of choosing Mullaghmast as the place for holding the meeting; upon this point, therefore, I can entertain no doubt.

The next matter for consideration, in my view of the case, respects the admission of the different newspapers, of which some of the traversers are the editors, both as that evidence respects themselves, and as it may concern or affect others. So far as that evidence is applicable to themselves individually, I do not think it necessary to make any remarks, concurring as I do with my Brothers Perrin and Crampton in their view of the evidence in this respect. But there is then to be considered the application of this evidence to the case of the first traverser, as it concerns a meeting at which he is represented as having attended and spoken; that representation, together with the report of his speech being printed in a paper, of which another of the traversers was at that time the registered proprietor and editor; that paper being, as it is, the only evidence laid before the Jury of his (first traverser's) speech, and of his attendance or presence at the meeting:—the ground of the objection to the reception of the evidence to these facts being, that although the paper so given in evidence be full evidence against him (the editor himself), and although it may be admissible, as an act of his in furtherance of the common design imputed to the other traversers, and so far affecting them, yet as being only a relation or narrative of certain facts, respecting the first traverser, it can be no evidence against him of the truth of those facts.

In addition to what has been said by my Brother Crampton upon the question, and in perfect conjunction with his opinion upon it, I do not feel it necessary to say more than that upon the principle of the authority cited from 24 State Trials (*The King v. Thomas Hardy*), I am satisfied that the paper was properly received in evidence against the first traverser, of those facts. In the case of *The King v. Hardy*, the private letter of Thelwall (a conspirator or party to a common design) addressed to another person of the same character, but not appearing to have ever been received by him, was held to be admissible in evidence against a third person, also of the same character, but who was not shown to have seen or known of the existence of that letter, or the matter contained in it; and admissible upon this ground, namely, that it was addressed by one of the several conspirators to another of those conspirators, and that it was introduced as subservient to the proof of the general nature and tendency of the conspiracy alleged and endeavoured

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to be proved as the foundation of affecting the prisoner with a share in that conspiracy. Now, in the present case, the paper produced is an authenticated statement or declaration of a person charged with being a participator in the common design imputed to several of the traversers; the narrative having a direct reference or relation to that common design, and raising the question of its tendency to the furtherance of it. And it is also subject to this additional observation, that instead of being a private and untransmitted letter, or narrative, it is a printed and published notification to the public generally, and especially to that part of the public who are members of the Repeal Association, and are in the condition of subscribers to the paper—a leading member of that Association being the principal traverser himself, and any misrepresentation or inaccuracy in the narrative respecting him being therefore open to contradiction or correction.

Upon this question I should not entertain any doubt, if it were not for the difference of opinion upon the point in one of the members of the Court, and which must have the effect of producing in my mind diffidence upon it. Indeed, I rather think that the objection has been reduced nearly, if not altogether, to a misdirection, or rather to the want of a sufficient direction in the charge to the Jury; and that is, if I understand it right, that they should have been told, that if there was any evidence of the first traverser being at that time a conspirator or participator with the editor in the common design, there was not sufficient evidence of it; but I apprehend, that this must go the length of holding that nothing but conclusive evidence of such a fact would be sufficient, that is, nothing short of a verdict, finding the fact of such conspiracy or common design. Whereas it appears to me that if there was evidence, and that satisfactory to the Jury, of facts of participation, it is quite sufficient to make the act of one the act of another in the furtherance of the common design.

The next question to be considered, according to my view of the case, is that which concerns the Rev. Thomas Tierney, who has been found guilty of so much of the first, second, fourth and fifth of the counts in the indictment as charges the conspiring to raise discontent and disaffection among the Queen's subjects, and to stir up jealousies and ill-will between different classes of her subjects, and especially to promote amongst the Queen's subjects in Ireland feelings of ill-will and hostility towards her subjects in other parts of the United Kingdom, and especially in England. Upon this, it has been suggested that there has been no evidence, as against him, sufficient to be left to the Jury, as a ground for his conviction; and that they should, therefore, have been directed to find a verdict of acquittal as to him; or, if not, that the attention of the Jury should have been so particularly directed to every question that

might arise in his favour, as to make that verdict more satisfactory to the mind of the Court, than it can, as it now stands, be considered to be.

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I confess that I have not been able to arrive at that conclusion. It appears to me that upon the case laid before the Jury in evidence, they had to consider, in the first place, that to the existence of such a conspiracy as that alleged in the indictment, towards this particular design, no words of express compact were necessary: that the knowledge of, and consent, and concurrence of the traverser in the common design might be inferred from his own acts and words, although no formal declaration of it can be shown: that they had then also to consider the fact of his joining and becoming a member of the Association on the 3rd of October 1843: the circumstances under which he and the other traversers then were—the notoriety of their previous acts, conduct and language: his own language to them, avowing his devotion to their leader, and his (the traverser) calling upon the members then present not to “desert that leader and sell their country,” but give him their acts and not their words merely. They had further to consider the meeting—the public monster meeting at Mullaghmast, which had taken place the day but one before: the notoriety of that meeting, and which, if he knew of it, could not then be out of his recollection, to consider as a proof of his knowledge and recollection, the accordance of his own language and sentiments on the conduct of the English towards the Irish with what was said at the Mullaghmast meeting—I mean in accounting for the choice of that place for the meeting held there,—and which language was apparently, it might be said manifestly, used for the purpose of impressing the minds of the Irish assembled there with feelings of hatred for English (contemptuously called Saxon) tyranny; and thereupon to consider whether he did or did not do so with an adoption of, and concurrence in a speech, designed to excite an Irish feeling of hatred and ill-will towards those who were represented as their English oppressors. This is certainly all matter of inference; and it is perfectly consistent with the leaving this inference to the Jury, that they should also consider all the circumstances in the traverser's favour—that of his not appearing to have attended any other meeting at which the other traversers were present; of his not having been shown to have had any individual communication with any of them; of his general good character and conduct, and especially of the assistance he was proved to have afforded to an officer of the Government. These circumstances were all before the Jury, who have found a verdict against him—acquitting him of other offences charged in the indictment; a verdict, therefore, founded mainly, as it may well seem to be, upon the coincidence of his language and declarations, with others of, and chiefly of, the principal traverser, evincing the design imputed to them of exciting feelings of hostility and ill-will in the Irish population towards the English.

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When I differ from the opinion of my Brothers Perrin and Crampton upon such a case as this, it is certainly with a most unaffected distrust of my own judgment upon it, and I will even add, my own wishes that Tierney had been excluded from the indictment; but when I am to decide and state my own judgment upon the evidence, and the verdict upon that evidence, I feel myself conscientiously bound not to express a doubt of the Jury's right to decide as they have done upon the evidence before them, and of their being fully warranted by that evidence to find that verdict. In my judgment, they were warranted to make the inference which they have made, and the verdict is not therefore impeachable upon that point.

I now come to a more general consideration of the case, as that case was conducted at the trial; and this, with a view to the argument by which it has been insisted that the verdict, generally speaking of it, is against the weight of the evidence given; and with a view also to the objections that have been made to the charge or summing up of the law to the Jury.

The offences laid in the different counts of the indictment may, in this view of the case, be shortly and summarily stated to be these; the main object of them being unquestionably that of bringing about a dissolution of the Union, that object not being in itself an illegal one; and the question, therefore, turning upon the illegal means alleged to have been used for the achieving that object. These are shown to be—first, the conspiring to effectuate that object by intimidation, to be raised by the exhibition and demonstration of great physical force—that purposed intimidation extending, in the terms of one of the counts (the eleventh) to the two Houses of Parliament; the means there specified being the addressing and delivering of seditious speeches, and the publication of unlawful, malicious, and seditious writings and compositions: secondly, the conspiring to stir up jealousies, hatred and ill-will between different classes of the Queen's subjects, and especially to promote amongst those in Ireland ill-will and hostility towards those in other parts of the United Kingdom, especially in England: thirdly, the conspiracy to excite discontent and disaffection amongst divers of the Queen's subjects serving in the army: fourthly, the conspiracy to bring into hatred and disrepute the Courts established in Ireland for the administration of justice. These charges are clearly, I may say unquestionably, charges of misdemeanour, and punishable as such. It is also quite clear, that each of these misdemeanours is that of a conspiracy, with a certain common intent, and which is consequently the essential matter of fact to be ascertained.

The case was opened by the Attorney-General, for the Crown, with a full statement of the evidence intended to be given in support of the several charges in the indictment, and his view of the law upon those charges, compared with the evidence to be adduced in support of them;

that evidence consisting, in a very great measure, of public documents—several of them newspapers, and others of a nature and description, and character, very applicable, either in the whole or in particular passages, to the different counts in the indictment; such passages as were considered material for the prosecution being read on the part of the Crown, and such as might be thought favourable to the traversers, or any of them, being read at the instance of their Counsel. There was also evidence given of speeches made at several meetings, and these, together with the general character of these meetings, and the incidents occurring at them, formed the principal part of the material evidence laid before the Court and the Jury on the part of the Crown. That evidence having been given, the case was spoken to on the part of the traversers, by the several Counsel concerned for them, each of them speaking to the case as it respected each of the traversers for whom such Counsel was engaged individually, and by all or more of their Counsel, as it respected all the traversers collectively; and lastly, the case was closed, on the part of the traversers, by an argument from the principal, or first traverser, as well on his own behalf, as on that of all the others. So that, upon the whole, their case was so conducted that it may, I think, be said, without any exaggeration, that it is not possible to imagine an argument fairly applicable to the defence of each and every and all of the traversers that was not brought to the consideration of the Jury, and that with the utmost possible force on their behalf. Those arguments were replied to on the part of the Crown by the Solicitor-General; and the charges of the alleged conspiracy, and the acts and documents in support of those charges were, both by the Attorney and Solicitor-General, agreed to be considered as commencing not earlier than the 13th of February 1843. And they also, as I understood them, confined the charges of conspiring to cause and aid in causing divers of the Queen's subjects to meet and assemble in large numbers, for the unlawful and seditious purpose of obtaining by intimidation, and by means of the exhibition of great physical force at such meeting, changes and alterations in the Government, law, and constitution of the realm, as by law established (with perhaps the exception of the charge respecting the Arbitration Courts), to the especial purpose specified in the seventh count, namely, the bringing about and accomplishing a dissolution of the Legislative Union now subsisting between Great Britain and Ireland.

The case being thus closed on both sides, the Court proceeded to the summing up to, or charging the Jury, after a previous consultation with, and concurrence of the rest of the Court, and especially with reference to the legal directions in it. By that charge the Jury were directed that the conspiring, as laid in the different counts of the indictment, was a high misdemeanour; and with respect to the Legislative Union, they were directed to consider that as an integral part of the constitution, and

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what could not be lawfully abrogated or modified, otherwise than by an Act of the entire Legislature as it at present subsists; and with a view to this, as a legal proposition, by which they were to be bound, in coming to their verdict, the Act of Union and the Queen's Coronation Oath were read to them. The charge further directed the Jury to consider that the entire offence, or body of offences specified in the indictment, was that of a conspiracy, or conspiring: defining the legal import of that term as the concert of two or more persons to bring about an end unlawful in itself, or an end abstractedly lawful in itself, but to be effected by unlawful means; and that although such a conspiracy might, and very commonly did, include within it treachery or secrecy, or both, those ingredients were not, nor was either of them essential to the crime. That, further, it was not necessary to the constitution of the crime, that the unlawful act conspired to be done should be effectuated either in the whole or in part; that the crime of conspiracy, if it existed, was complete, although, in point of fact, the criminal end might not have been attained; that, further, if the Jury were satisfied that such a criminal agreement or conspiring had taken place and continued, from thenceforward the acts of each one associating in such a conspiracy were reciprocally evidence against the others of them, if conducive to the same criminal end, though it were not proved that each and all of them had participated in the particular individual act, or although it should not appear that each and every of the several parties charged with the conspiracy had been guilty of the perpetration of any particular act towards the common illegal end intended to be attained.

The general questions then proposed to the Jury for their verdict were—first, whether the traversers, or any and which of them, did conspire and agree to create discontent and disaffection among the Queen's subjects, and hatred and unlawful opposition to the Government and constitution: the second, whether they, or any, and which of them, had conspired to stir up jealousies among the Queen's subjects, and to promote ill-will from part of the Queen's subjects towards others of them, and especially from the Irish towards the English: third, whether they, or any, and which of them, conspired and agreed to excite disaffection in the army: the fourth, whether they, or any, and which of them, had conspired and agreed to collect assemblies in large numbers in Ireland, in order to obtain changes in the laws and constitution by intimidation and the demonstration of physical force: the fifth, whether they, or any, and which of them, had conspired and agreed to bring the Courts of Judicature established by law, into disrepute, with the intent to induce the Queen's subjects to submit their disputes to other tribunals. The conspiring, with the intent imputed by the indictment to the traversers was thus stated to consist of five branches, any one of which being brought home to the traversers, or any two of them, would establish

against them the offences which it was undertaken on the part of the Crown, and which it lay upon the Crown to prove.

It was then stated to the Jury, and their particular attention was called to the statement, that the traversers had one and all made this defence, namely, that their designs were not criminal—that they had grievances—that they had a right to complain of those grievances, and had a right to lay them before the public, although it happened that in so doing they attended multitudinous meetings. The Jury were then distinctly told, that if they should be of opinion that such were the true designs and objects of the traversers, that they had not the criminal intentions imputed to them, and did not resort to criminal means for the furtherance of those objects, they (the Jury) were bound to acquit them, or such of them as should appear to stand in that innocent condition. But that if, on the other hand, the Jury should be of opinion, that those were not the real objects of the traversers, whatever their apparent designs might be, and that, however they might be masked, they had, in truth, the criminal intents imputed to them on the part of the Crown; and if the Jury should be satisfied further, that the traversers, or some of them, in furtherance of their common design, acted with a common criminal object, and in a common concert with each other—in that case, they (the Jury) would be bound to find them, or such of them as should stand in that condition, guilty of the conspiracy so proved, and in which they should appear to have been participators. The Jury were further and urgently advised that the *onus* of proof necessary to conviction lay upon the Crown; that they (the Jury) must be satisfied, in order to find the traversers, or any of them, guilty, that the implied guilt was proved by the cogent proof of the alleged conspiracy, compact, agreement, common design, so as to leave it above and beyond any reasonable doubt, and not resting upon presumption; and that otherwise all the traversers, or such of them with respect to whom such a doubt might exist, should be acquitted. The Jury, who heard the case, both in evidence and in argument, on the part of the Crown and of the traversers, and in direction and observation from the Court, with most unrelenting attention, have found a verdict on those respective issues; which finding, as I conceive, exhibits a very careful consideration of the evidence, as it affected all and each of the traversers.

The case is now brought before the Court on an application to set aside the verdict, grounded, in part, upon the four first of the points which I have observed upon; in part upon the admission or effect of certain particulars of the evidence which I have also observed, and submitted my opinion upon—but further, the application is grounded upon certain other opinions, which I think may be all considered under the head of objections to the charge delivered by the Chief Justice, on summing up the case to the Jury; the substance of that charge (and

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more especially as it consisted in matters of direction) having been, previously to its delivery, consulted upon, and concurred in by all the members of the Court.

The anxiety of the learned Counsel, in their defence of the traversers, appears to have led them into a very critical and elaborate description of, and (if I may use the expression) animadversion upon the manner in which the several questions were left to the Jury. I do not mean to apply that phrase to the discussion of any of the points upon which the rejection, admission, or application of particular matters of evidence came into controversy during the examination of the witnesses, and the reading or offering in evidence of the written or printed documents; nor to the legal meaning of the term "conspiracy," as the definition of that term was laid before the Jury for their government in considering and coming to the verdict; for although there was, in the course of the trial, and even after the evidence had closed, some criticism upon that subject, it was not, as it struck me, much persisted in; nor to the legal direction given to the Jury upon the Legislative Union, as now subsisting: for I do not recollect that there has been any complaint made of the charge upon that ground, nor certainly to the very peremptory direction given to the Jury to take upon themselves the inference to be drawn from the evidence laid before them, and not to find a verdict against the traversers, or any of them, unless satisfied beyond any reasonable doubt of the validity and truth of the inference leading to such a verdict. On that part of the charge I do not recollect that one word was said on the part of the traversers, during the argument for a new trial. But it was mainly objected, that in adverting to the documentary evidence, those passages in them which had a tendency to produce inferences unfavourable to the traversers, were relied upon and enforced, without calling attention to other passages which would, or might, have led to an opposite effect.

With respect to this, it is to be observed, that on the part of the Crown such passages were read as were relied upon in support of the prosecution; that those, in some instances were encountered or followed by others, which the Counsel for the traversers thought fit to have read on their part; some of these appeared to me to have little or no reference to the merits: but, during the delivery of the charge, the Chief Justice was occasionally reminded of any omission or mistake that he was supposed to have made in allusion to what had been read or observed upon: and upon all these occasions, he most willingly attended to, and encouraged the interruption, and also himself suggested the permitting the Jury to take into the box with them the whole of the documents read, or such of them as the prosecutor and traversers' Counsel might agree upon, but which suggestion was not acceded to.

The arguments of the Counsel for the traversers were of necessity of very great length; and the Chief Justice, not concurring with them, took the course which, in that case was, as it appears to me, the most advantageous he could take for the traversers, namely, the leaving most or many of those arguments to the consideration of the Jury, without remark or comment upon them. The charge has, however, been commented and animadverted upon, on the ground of its having expressed too strongly the intimations of a judicial opinion against the traversers, upon the inferences to be drawn from the written documents and reports of speeches given in evidence, and the criminal intent of the several traversers to be collected from them. Upon this I will only say, that the right and the propriety of a Judge delivering to a Jury his own opinion upon the results of evidence of that nature—evidence which must, notwithstanding, be left to the Jury, in the exercise of their own uncontrolled judgment to find a verdict upon—that right, I say, which ought to be exercised according to the judicial discretion of the Judge, but without the interposition of any authority over the discretion of the Jury in such a case, is, as I conceive, too well established to require any further argument or observation in its support. This right, however, does not at all clash with the unquestioned and unquestionable right of the traversers or their Counsel to controvert the accuracy of the inferences so suggested to the Jury; and accordingly, they have led, in this case, to the further ground upon which the motion to set aside the verdict is rested, and that is, that the verdict found by the Jury should be set aside, as being against the weight of the evidence laid before them. And I am perfectly free to admit, that, if this be so, or even if, upon any just or reasonable ground or circumstances occurring either before or subsequent to the verdict, the Court should be led to a reasonable conclusion that the case ought to receive a further investigation by a Jury, a new trial should be awarded.

And that leads me to a very brief and summary statement of my own judgment upon the questions which are the subject of the issues left to Jury, and upon which they have found their verdict.

First, upon the charge of conspiring to excite meetings and assemblies of large numbers, at various times, and in different places within Ireland, for the purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, to bring about and accomplish a dissolution of the Legislative Union, I entertain no doubt that the verdict found against the traversers, to whom that finding extends, is warranted by the evidence. The verdict upon this point does not find, nor indeed is it alleged in the indictment, any intended use of such physical force, other than the intimidation to be excited thereby; and I am willing to believe, and do believe, that no other use of that physical force was intended by

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the principal traverser, or by the other traversers, of whom, as well as of the great masses of the population assembled at such meetings, he appears, and has avowed himself to be the leader; and it appears to me that it was no part of his or their common design to commit any outrage or violence towards the attainment of that object, or even to excite any apprehension of any violence or outrage to take place at the time of such meeting, or consequent upon them. The misdemeanour, however, consists, and is found in the common design of attaining that object, the dissolution of the Union, by the intimidation intended to be excited.

The only, or at least, the principal ground upon which I could entertain any doubt, with respect to this charge, arises upon a part of the argument of one of the learned Counsel for the traversers, who has stated, and truly stated, the principal traverser as well known to be a gentleman of first-rate talent, peculiarly versed in criminal law, and perfectly aware of the nature of the crime of conspiracy; and from that has inferred the difficulty of believing that he rushed, with his eyes open, into the commission of that offence. This is a very fair argument, and, as it appears to me, can only be met by a full consideration of all the circumstances in the case; adding to them this reflection, that an ardent ambition to be the successful leader of a great part of the population of the country, eager for the attainment of what he might conceive to be a just and honorable purpose, might lead even a mind so informed as that of the principal traverser to the hazard of committing a misdemeanour like this; and that, under the conception of such a course being the only, or the surest, means of avoiding the awful consequences of open rebellion, by the creating what he might conceive to be a salutary terror in the two houses of the Legislature. Whatever motives, however, may have led him, and those who have acted under his influence, to the joining in the commission of this offence, that of conspiring in the common design of endeavouring to effect the abolition of the Union by the intimidation arising from the demonstration of great physical force, it does appear to me that he and they have fallen into it, and that the verdict upon that issue is therefore fully warranted by the evidence.

The next issue is that which charges the conspiring to promote amongst the Queen's subjects in Ireland feelings of ill-will and hostility against the Queen's subjects in other parts of the United Kingdom, especially in England. With respect to this, it depends upon the inference which the Jury had to draw from the language used at some of the meetings—the monster meetings as they are called—held for the avowed purpose of promoting the great object in question—the abolition of the Union. I think upon this issue the Jury, connecting with it the general design evinced by the evidence on which the first issue was found, were well warranted in the verdict they have found, as to the concerted design with which that language was used and reiterated.

The next issue which I have to advert to is the charge of unlawfully conspiring to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, and to diminish the confidence of the Queen's subjects in the administration of the law therein, with intent to induce them to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the tribunals by law established, and to submit the same to the judgment and determination of other tribunals, constituted and contrived for that purpose, and which in the ninth count of the indictment is also stated to be an unlawful conspiring to assume and usurp the prerogative of the Crown, in the establishment of Courts for the administration of the law. If this had been a proceeding by the traversers simply for the purpose of facilitating the mode of settling disputed claims by arbitration, in conformity with, and of the same or a like nature with other well known institutions for that purpose, such a proceeding might be very unobjectionable; but it is plain to me, from the whole of the evidence, that it is and was intended to be an assumption of power in derogation of the Courts of Justice as established by law, and a part of the common design and concerted purpose imputed to the traversers by the indictment.

The remaining issue which I have to express my judgment upon is that which charges a conspiring to excite discontent and disaffection amongst divers of the Queen's subjects serving in the army, and upon which the principal traversers, and Barrett and Duffy only have been found guilty. It has been with very great pain, and not without some difficulty, that my mind has been brought to a conclusion in accordance with the verdict of the Jury upon this question. It is, however, to be observed that the offence laid in the indictment is not that of an intent to excite revolt, or mutiny, or desertion, but discontent and disaffection; upon that intent as it is laid in the indictment, and as it is to be collected from the language appearing to have been uttered or published by the accused parties, the Jury were to judge: and taking into consideration the time and the peculiar circumstance when and under which that has taken place, I find it impossible to say that the Jury were not warranted in finding the intent as charged in the indictment, or to hold that their verdict is in that respect against the weight of evidence; and the latter, as if the common design of creating intimidation by the demonstration of great physical force, has been properly found, and which I believe it to be a public attempt upon the discipline and subordination of the army, tending to make it a force not to be relied on in any emergency, might well be a part of the means used in and towards that common design of intimidation.

Upon the whole, I am of opinion that the verdict is not against the

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I have hitherto, on the discussion of this motion, abstained from interference. I have made neither observation nor comment, preferring, from motives of delicacy, and on personal grounds, to leave to my Brethren on the Bench the consideration or the correction of any imputed error or mistake I may have fallen into in the charge delivered to the Jury by me, as the organ and head of the Court. If error has been fallen into, or mistake committed, it is fit it should be corrected and set right. If the parties are entitled so to have it, no one ought to be, and, I trust no one would be, more happy than myself, to have my errors or mistakes rectified, and justice done according to right. I have hitherto, except as a listener, taken no part in this motion; and those concerned in it must do me the justice to confess they have not been interrupted. This is all the commentary I make, or intend to make; and I pass on to a consideration of the particular grounds on which this motion is rested, so far as these grounds are not of a nature personal to myself.

It is conceded, that if a proper case be made for it, the Court will entertain a motion for a new trial, in a misdemeanour case (for in felonies it is not so), and on a trial at bar. The Attorney-General concedes this; and the rule, perhaps, is not improperly laid down by Mr. Erskine and others, in "*The King v. Sir J. Mawby and another (a)*"; "The attaining of *substantial* justice is so decidedly the ruling principle on which the Court acts, that in civil cases the Judges have sometimes refused to grant a new trial, even where the verdict has been against law, if, upon the whole, they see that *substantial* justice has been done. *A fortiori*, in criminal cases, where the Crown has no interest but the attaining *solid* justice, the Court will exercise their power for the purpose of attaining it, and their jurisdiction must necessarily be co-extensive with this great end." In p. 638, Lord Kenyon says:—"I think the rule was correctly stated by defendants' Counsel, that in granting new trials the Court know no limitations (except in excepted cases), but they will either grant or refuse a new trial, as will tend to the advancement of justice." There the rule for a new trial was discharged: the parties had been convicted of a conspiracy.

But there are certain, as I may call them, preliminary matters, which I am called on to notice judicially.

(a) 6 T. R. 623, 638.

The first of these, in point of order, was the alleged mistrial, in consequence of Mr. Rigby having been sworn as John Rigby, instead of John Jason Rigby. He was on the jury list, and on the panel, as "John Rigby," and was sworn as John Rigby, so that on the record all appears perfectly regular; there is no question but that the Juror sworn was the Juror summoned. There was but one individual of that name, and the Juror sworn was that individual. He was sworn in the presence of the traversers, with a full knowledge at the time of all the facts relating to him. No person made any objection but the Juror himself, who, wanting to be excused, said, when called to the book as John Rigby, his name was John Jason Rigby. It appeared that the name on his door was William and John, or at least William and J. Rigby, and there was evidence from which it might be inferred he was known by one name as well as by the other, which would have been a good replication to a plea in abatement, if this matter had so come before the Court. See *Fisher v. Magnay* (a), besides the other cases referred to. I cannot see on what ground the traversers should now be permitted to allege this as a cause of mistrial.

The second ground was "want of jurisdiction in this Court to extend the time for the trial at bar, into the ensuing Vacation, when the trial began during the preceding Term," under the statute 1 & 2 W. 4, c. 31, s. 3. The words of the Act do not require that the day or the time (which seem to be used indiscriminately) shall be confined to trials beginning in the Vacation. But the sense and meaning seems to be that, whenever it shall begin, or without reference to when it shall begin, whether in Vacation or not, so much of the time for said trial as shall happen in the Vacation, shall, for the purposes of the trial, be deemed part of the preceding Term. It appears to me the orders are right, and in conformity with the Act. At all events, it is on the record, and the traversers will have an opportunity of appealing to a higher tribunal.

The third ground was the venue. In *Rex v. Briscoe and Scott* (b), Grose, J., in passing sentence, says:—"Conspiracy is a matter deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, which hardly ever are confined to one place; and there seems no reason why the crime of conspiracy may not be tried wherever one distinct overt act of conspiracy is in fact committed." The case of *Rex v. Hart and White* (c), for a libel on the Chief Justice of B. R., Lord Ellenborough, an objection was made that there was no proof of publication in London, and it was held that an affidavit made and signed by the printer and publisher, and proprietor of a newspaper, as required by 38 G. 3, c. 78, *Eng.*,

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(a) 6 Scott, New Rep. 602.

(b) 4 East, 170.

(c) 10 East, 94.

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same as 56 G. 3, c. 56, *Ir.*, which affidavit contained the names of the parties, the place where the paper was printed, and the title of it, together with the production of a newspaper, tallying in every respect with the description of it in the affidavit, is not only evidence by that act of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be. Slight evidence of venue has always been considered sufficient. Here there was evidence of declarations under the Stamp Act, by Berrett of the *Pilot*, and by Duffy of the *Nation*. Dublin may be said to mean, *primâ facie*, city of Dublin, where the Court sits. There was evidence of acts of the Association, of which all the traversers were members at the time of the trial, dated Dublin. Browne was the printer of the Association; ; it was proved he lives in Nassau-street, Dublin: he proved he heard of the Repeal Association in Dublin: he was employed by them as printer. These and the other circumstances detailed by the other members of the Court, are quite sufficient evidence as to the question of venue.

Fourth ground.—The omission of certain names from the jury list. It was the effect, as it would appear, of accident or negligence. There is no reason to impute fraud, or to say that the jury list as it stood, containing about seven hundred names, was not a sufficient and competent list, whereout a fair and impartial panel may have been arrayed. This subject has been before the Court on two occasions, and on both of those occasions I delivered my opinion at length on the construction of the Jury Act, in relation to the present subject. I see no reason to view the subject differently now; the matter is, on the record on the challenge question, open to a writ of error. I agree with the rest of the Court that there is no ground on this account to set aside the verdict; and I do not find it necessary, on this occasion, to go into my reasons more at length.

Fifth ground.—As to the reception of illegal evidence, in permitting the Mullaghmast publication to be given in evidence, not being, as it is said, brought home personally to the traversers. Observe what it was, and how it was brought forward. For some time previous to the 1st of October 1843, a multitudinous meeting was summoned to Mullaghmast, on that day, to declare for repeal. That summons was issued by the orders of Mr. O'Connell and the Repeal Association. All Leinster were invited to attend, amongst the rest, consequently the vendors and circulators of that publication; and it was for the Jury to say whether or not that publication, and the speeches made by the traversers at the meeting, were not part of a common design, and with a common illegal purpose. The publication was as follows:—[His Lordship here read the Mullaghmast ballad.]*

* Arm. & T. 278.

I say no attempt was made by any of O'Connell's police to prevent the circulation of this paper. Now, so far were they from putting down, or attempting to put down, the circulation of that story, and that horrible statement, it will be found that in the speeches made by O'Connell, one in the morning to the assembled multitudes, and the other at the dinner, or banquet, the very same story, not exactly perhaps in the same words, but in substance and in spirit altogether the same, was repeated and delivered by him. What object had he in that? What object had they who attended him on that occasion, and took part in his deliberations, some of whom repeated, in language of their own, the same story and the same sentiments?

This shows the character of the meeting as much as if this publication had been spoken extensively over the field. It was sold and distributed by thousands. No one attempted to stop its circulation, though O'Connell's police were there in numbers. It is a detail of the dreadful slaughter and murder, painted in glowing colours, of the cruelty and perfidy of the English in former days, perpetrated on the betrayed and unoffending Irish, at the Rath of Mullaghmast, warning the Irish against English treachery, and stimulating their resentment. Many speeches were made at the platform or at the dinner by O'Connell, Barrett and Ray, relating more or less to the self-same story, with epithets the most revolting, imputing to the English the same ferocity, cruelty and treachery that the publication had detailed: O'Connell assigning that as the reason why the Rath of Mullaghmast was chosen by him as the proper place for that great meeting. This is evidence, not only of the character of the meeting, but evidence of a common design to bring about by those common means the Repeal of the Union, by exciting and fomenting hatred and ill-will of the Irish against the English. And I would say, generally, that when parties call a meeting of this kind, they are, *primâ facie*, answerable for the acts of those who attend it, especially when there is evidence that their own acts at the same meeting, and on the same occasion, are of a similar nature.

Sixth ground.—Next it is said that the newspapers have been unduly received in evidence, whether against the publishers—Barrett of the *Pilot*, Gray of the *Freeman*, Duffy of the *Nation*—or against O'Connell and the other traversers. I am of opinion that they were evidence against all. That they are evidence against the publishers respectively, there seems little reason to doubt: the reasons are already given by my Brethren. The same statutable proof that was held sufficient in *Morgan v. Fletcher* (a), and in *Rex v. Hunt*, was given here, with proof of identity, quite sufficient to go to a Jury, where the identity was not proved by proof of handwriting, of which there was also distinct evidence.

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(a) 9 B. & C. 382.

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The newspapers were evidence against the others also. It is perfectly plain that the publication of inflammatory and seditious speeches, having for their object the sowing hatred and jealousies in one class of the Queen's subjects, *e.g.*, Irish against English, is in itself an illegal act, and the same is an act that may be done in furtherance of a common criminal design.

This is not in the nature of the mere confession of the party, which may be evidence against himself only, but not against a third person, as in the case of the letter that was rejected in *Hardy's* case; nor in the nature of a mere narration of facts not done in prosecution of the conspiracy, or in furtherance of the common criminal design; but (and I will take now for example the case of Barrett and the *Pilot*), the publication made by him in that paper, detailing the meeting at Mullingar, and the speeches made thereat, was an important and material act done by him in prosecution and furtherance of the common evil and criminal design. On this I would refer to Lord Chief Baron M'Donald's judgment in *Hardy's* case (a), and Baron Hotham's judgment (b).

When evidence is once given to go to the Jury, of a conspiracy against A. B. and C., whatever is done by A. B. or C. in furtherance of the common criminal object, is evidence against A. B. and C., though no direct proof be given that A. B. or C. knew of it, or actually participated in it. Coleridge, J., in *Rex v. Murphy* (c), says:—"If the Jury be satisfied there was concert between them, I am bound to say, that, being satisfied of the conspiracy, it is not necessary the Jury should find all the parties doing each particular act; as, after the fact of a conspiracy is once established in the mind of the Jury, *what-ever* is either *said* or done by *any* one of the defendants, in pursuance of the common design, is, both in law and in common sense, to be considered as the *act* of them all." Then, this is to be considered the act of O'Connell as well as Barrett; and O'Connell is answerable for it as well as Barrett. "It is," says M'Donald, C. B.,—*Hardy's* case (d)—"an act done by one of the conspirators, which, in order to show the nature and tendency of that conspiracy, may be read against any other." And I would say more; it is evidence against O'Connell of what is, in that paper, said to have taken place in furtherance of the conspiracy.

It was a great object to have multitudinous or monster meetings. O'Connell, in his speech at Mullaghmast, states the influential part he took in procuring them. There is abundant evidence, they formed an instrument in furtherance of the common design. It was an object with all to put forward O'Connell as the leader, whose commands they were

(a) 24 St. Tr. 475.

(b) *Ibid.*

(c) 8 C. & P. 811.

(d) 24 St. Tr. 475.

to obey, whose advice they were to follow. See Ray's speech at Mullaghmast, *Arm. & T.*, 864; Tierney at the Association, 869; O'Connell himself at Mullaghmast, 855. To represent O'Connell as present, as making these speeches, as assuming and acting in the leadership, was evidence to go to the Jury, of the common design, and such representations were acts done in pursuance of it—evidence against Barrett; evidence also against O'Connell; Barrett publishes the speech as if spoken by O'Connell, as an act in furtherance of the conspiracy. I do not mean to say that it was conclusive evidence. O'Connell might have given evidence, if the fact warranted, that he was not there or did not make the speech, or that if he made a speech, it was not of the character or tendency represented; but he attempted no such evidence; and on the present motion for a new trial—a motion to the discretion of the Court—on which he has made an affidavit, there is no denial that he attended at Mullingar or Tara, or that he spoke the speeches attributed to him in the papers.

If the conspiracy be proved to have existed, or rather if evidence be given to go to the Jury of its existence, the acts of one in furtherance of the common design are the acts of all; and whatever one does in furtherance of the common design, he does as the agent of the co-conspirators. If Barrett, in furtherance of the conspiracy, publishes a paper, and represents O'Connell to be at a great monster meeting at Mullingar or at Tara, and represents him as making a speech there, of exasperation, or excitement, to which Barrett gives the personal weight and influence of O'Connell's efforts, and of his presence, in furtherance of the common design, he makes that statement as the agent of O'Connell; acting too within the scope and object for which he is employed, and thus that statement becomes evidence of the facts against himself and against all the conspirators.

There is another ground on which these papers are evidence against O'Connell and against the traversers, who all appear to have been members of the Association. O'Connell in particular, was a leading member of it: chairman of many of its committees—amongst others, chairman of the committee that made the report on the duties of the repeal wardens. That report is in evidence, published by Browne, the printer to the Association. One of the duties is in p. 9, of the "instructions" to the repeal wardens—the circulation of newspapers. The tenth duty of the repeal wardens, acting under the order of the Association, is to have the newspapers to which each parish or district may be entitled, put into the hands of such persons as will give the greatest circulation to their contents, so that each paper may be read by, and its contents communicated to as many people as possible. The *Pilot* is one of the papers the circulation of which is thus inculcated as a *duty*—*duty nine*. The sum of £20 entitles the repealers of the district whence it comes,

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to the *Pilot*, or *Evening Freeman* newspaper; if they prefer either to two weekly papers. Here then, again, there is evidence to convict O'Connell with the circulation of the *Pilot*; and there is evidence against him in regard of publications of a criminal nature, with which that journal or newspaper is fraught, especially those that are framed to promote the conspiracy or furtherance of the common design. On this ground, therefore, also, I consider the evidence admissible.

But—and I consider it a very important matter in this case—the objection, if any, was not made at the trial, or not made on this ground, or in a specific tangible form; and I look on it as a principle, that if an objection exists, whether to the charge of the Judge, or to the reception of evidence, the objection must be taken at the time, and taken in a specific tangible shape, so that it may not be misunderstood. The reason is, because if then so made, it may be easy by additional evidence or otherwise, to supply or correct what was supposed defective: or, if the objection lay to the charge of the Judge, he might, on the supposed error being pointed out, retract, or qualify, or explain what he had said. On that ground, the principle seems to apply equally in misdemeanours as in civil cases. The House of Lords, in *Ball v. Mannin* (a), would not suffer an objection to the Judge's charge to be argued, because it was too vague and indefinite. Lord Tenterden, in giving judgment, p. 22, says:—"Counsel intending to raise that objection (what was incapacity 'to avoid a deed'), should call upon the Judge to give more specific 'direction, that he may have the opportunity of correcting his error.'" Lord Plunket concurs, and says:—"But as to the ambiguity of the 'direction, if that be made a ground of objection, it ought to be distinctly stated to the Judge at the time.'" I see no difference in principle between a civil case and a misdemeanour, in a matter of this kind. I do not mean to say that if it were to appear to the Court that material injustice had been done, they would not go farther in a case of misdemeanour. But I would say, as a general rule, the principle was the same, as applicable to both cases. But here there is no reason to suppose that injustice has been done. There is no affidavit denying any fact, the denial being only an inference of law that the party had been guilty of any conspiracy;—no suggestion of surprise;—no statement of any new evidence.

But it is said the objection was made. I consider not. Objections were, it is true, made, as to sufficiency of statutable proof,—identification,—publication. These were discussed, argued, and finally decided against such of the traversers as made the objections, on grounds that do not now call for re-investigation. But the present objection is that, though the newspaper may be evidence against Barrett, it is not evidence against

(a) 3 Bligh, P. C. N. S. 22.

O'Connell or the other traversers. In this way the objection was not made during the pendency of the trial—while the evidence was in progress—before the case had closed. To make an objection *after*, is to make it too late, especially, if it be an unsubstantial objection. It appears, however, Counsel for Barrett, in his address to the Jury, made some objection; but if he objects to the *admissibility*, it is on the ground in which in *Hardy's case* the majority of the Judges concurred in rejecting Thelwall's letter. And moreover, all through the trial, and during the speeches of the defendants' Counsel, the Counsel really acted for all the traversers, though nominally, and professing to be for individual persons. The newspapers were read, *ad libitum*, passages for the Crown, passages for the traversers.

Now, as to O'Connell himself. It is said he made an objection in point of law; and something to this effect fell from Judge Perrin; but, with great respect, I do not so consider it. O'Connell says*:—"As to myself, I am not here to deny any thing I have done, or to palliate any thing I have done; on the contrary, I am ready to re-assert in Court all I have really said—not, of course, taking upon myself the clumsy mistakes of reporters; and not abiding by the fallibility which necessarily attends the reporting of speeches, particularly when they are squeezed together for the purposes of the newspaper press. However, I do not hesitate to say, that there are several harsh things towards individuals, and clumsy jokes, which I would rather not have said; but the substance of what I did say, I avow, and I am here respectfully to vindicate it. You know all my actions, and I am ready here, not only to avow them, but to *justify* them; for the entire of what I *said* and what I have done, was said and done in the performance of a high and sacred duty—an endeavour to procure the restoration of the Irish Parliament." Here he takes his stand, and denies nothing; but justifies what he has done. Now, observe, all this is addressed, not to the Court, but to the Jury. He then dwells on his description or definition of conspiracy; then, in p. 607, he adverts to the evidence that had been adduced, which, he says, consists of two subjects—the meetings and the newspapers. Again, p. 613, he proceeds thus:—"I have now done with those meetings, and I ask you, what evidence are they of the existence of a conspiracy? Well, as I said before, I will leave those meetings, and come to the next evidence as to this conspiracy, which is, the newspapers. I will take up the general nature of the evidence in this respect, and I submit to you, that with the exception of the speeches proved to have been delivered by me, those newspapers are no evidence against me; and see what a circle is pointed out for you to travel over, so far as they are concerned.

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"Are you to go round and spell out conspiracy? *for they are not evidence unless there be conspiracy. I leave that to the Court as matter of law.*" This, I believe, was the passage that induced my Brother Perrin to say O'Connell made the objection. With all due respect to him, that is not the objection in question, nor in fact any objection at all, nor a position which I, as one of the Court, would controvert. On the contrary, I concur in the statement, that unless there be conspiracy, the newspapers are not evidence against O'Connell; but I take the converse of the proposition which O'Connell appears to concede, that if there be proof of conspiracy, they are evidence against him. The point on which we differ is, as to our view of conspiracy,—O'Connell insisting there can be no conspiracy unless there be secrecy,—I being of opinion, that however frequently secrecy may occur as an element in conspiracy, it is not a necessary ingredient, but, that conspiracies may and have taken place without it.

In his address to the Jury, O'Connell accuses the Crown of arguing in a circle, as regards the newspapers. The fact is not so, because, independent of newspapers not printed by the traversers themselves, there was abundant evidence to go to the Jury against them all, of the existence and partaking of the conspiracy and common illegal design; which being once established in the mind of the Jury, the newspapers published by any, in furtherance of the common design, are evidence against all; and so they appear to have been treated. Addressing the Jury on their weight, O'Connell says*:—"What, after all, have those newspapers done? Of what have they been guilty? Of publishing a parcel of speeches, which I question if any one of them would be remembered if it were not for this trial. It is giving fictitious and absurd importance to these newspapers. They produced no deleterious effect whatsoever. The Attorney-General himself has admitted the peaceable nature of my intentions; and nothing could be more fair than the reading of those portions of the newspapers which showed this." In p. 615, he says:—"My Lords, it has been proved sufficiently in the newspapers that no man ever possessed so much of public confidence as I do." In p. 619, he says:—"Gentlemen, there is another matter to which I would wish to call your attention—my constant avowed allegiance to the Sovereign; that you will find in all the newspapers." The fair result of all this I consider not an objection to the admissibility of the newspapers, but a resort to them on his own behalf. I am of opinion that this subject affords no ground for a new trial.

The next point is with respect to Tierney.

The question in regard to him is,—Is there evidence to support the finding of the Jury, to the extent that he conspired with the other traver-

* A. & T. 614.

sers to raise and create discontent and disaffection amongst the Queen's subjects, hatred and unlawful opposition to the Government and constitution, and to excite one class of the Queen's subjects against the other, especially the Irish against the English?

He appears on two occasions, once at Clontibret, at a meeting there on the 15th of August 1843, and once in Dublin, on the 3rd of October 1843. With respect to the former, it was disposed of by my advising the Jury, for the reasons mentioned in the charge, not to convict him in respect of any thing that occurred there. As to what passed on the 3rd of October, there had been a multitudinous or monster meeting at Mullaghmast, on Sunday, the 1st of October, convened in such a manner as to give it the utmost publicity, by the orders of O'Connell and the Repeal Association. Multitudes attended there. Many of the traversers attended, and made speeches of a most inflammatory character, calculated, more or less, to bring about that common design, stated to be an object of conspiracy. The speeches will be found to be of the most exasperating kind, containing the history and details of a most bloody and perfidious massacre, committed between two and three hundred years ago, at Mullaghmast, in the county of Kildare, by the English soldiery, under the Lord Deputy, on the Irish, whom they had invited to a feast, and murdered in numbers in cold blood. This was on the 1st of October 1843. On the 3rd of October, the day but one after, Tierney appeared at the Repeal Association in Dublin, where were assembled, amongst others, O'Connell and most of the other traversers; and Tierney made a speech: and the Jury were directed to consider the nature and character of that speech, and how far the object of that speech fell in with and partook of the nature and objects of the speeches made at Mullaghmast, and were evidence of the general nature of a common design.—[His Lordship read Tierney's speech.]

Had he any common design, in communicating these particulars, of exciting discontent and hatred between the Irish, upon whom these murders and robberies were said to have been committed, and the English, which had long been forgotten, but which were revived by him? He gives a tissue of stories relating to the battle of Benburb, the battle of the Yellow Ford, and others, in which he states that the Irish were victorious, and that the English were defeated with great slaughter. Why did he introduce these topics? Was it for the purpose of showing that in former times the Irish were brave, and that they were (as he prefaces his statement by saying) "the first to resist and the last to yield?" or were these facts of English perfidy, and English cruelty, of Irish victory and English failure, brought forward for the purpose of promoting Christian charity and peace, after the lapse of a period of between two and three hundred years? He concludes the statement of those facts thus:—"Mr. Chairman, in the name of the county I am from, and

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T. T. 1844. "particularly of my own parish, Clontibret, where a hundred fights were
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 v. "name of that people, the children of the men that fought the battle of
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 "of that county alone, permit me, in their names, and in my own, to
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 PENNR- "have the honour of handing to you ninety-two pounds." He then
 FATHER, C.J. entered the Association as a member; he was received with acclamation,
 and that which he had been detailing to them was adopted by them, and
 received with unbounded applause. Did he, or did he not, adopt the
 objects and views of that Association with O'Connell and the other
 members now accused with him?

It appears to me that there was, I should say, strong evidence to go to
 a Jury of a common criminal design for a common criminal purpose, to
 be inferred from community of object, between the speeches made by
 the other conspirators at Mullaghmast on the 1st of October, and the
 speech made by Tierney in Dublin, on the 3rd of October; and there
 is further evidence of the same, from what followed on the delivery of
 Tierney's speech. The speeches are not, it is true, identical, but they
 are *ejusdem generis*, to be left to the Jury as indicative of the common
 illegal purpose, the exciting disaffection and hatred, *as much* as if
 Tierney's speech, instead of the battles of Benburb and the Yellow
 Ford, and the murder and treachery to Hugh Macmahon, had given the
 history of the murder and massacre and treachery at Mullaghmast. I
 am, therefore, of opinion that the verdict of the Jury with regard to
 Tierney was well founded.

On the remaining subjects contained in the respective notices for a
 new trial, I persevere in the course I have hitherto pursued. I forbear
 from further comment, but concur with the judgment of the Court.

The *Attorney-General*.—After what has been suggested by two
 members of the Court, it is not my intention to call for judgment upon
 Thomas Tierney.

CRAMPTON, J.—As this course is to be pursued with respect to this
 particular traverser, I have to observe that my opinion concurs with my
 Brother Burton and my Lord Chief Justice, in refusing the application
 for a new trial to the other traversers.

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A motion to amend the *postea* ought to be made within the first four days of the Term succeeding the verdict.

Mr. *Whiteside*, Q. C., with whom was Mr. *Close*, moved for a return in the shape of an amendment of the *postea*, that certain facts might be put on the record. As to these facts there is no dispute, and we make the present application with a view of carrying the case before another tribunal. The first fact is the extension of the Term into Vacation; and the second, the separation of the Jurors; and also, that the verdict may be entered precisely in accordance with the finding. It may be said that the separation of the Jury was with the consent of the traversers' Counsel, but Lord Tenterden, in *Rex v. Kinnear* (a), says, "A Counsel ought not to be asked to consent to any thing in a criminal case." The Crown have stated on the *postea* that the Jury had obtained leave to withdraw, not as we wish the entry, that they did actually withdraw. They use the words too, that the sittings of the Court were duly continued; we object to this inasmuch as it may be evasive. The other part of our application is as to the indictment, issue-paper and finding; we say, it is a partial finding, not a special verdict. The verdict should be entered up from the issue-paper in the words the Jury have found, not as the Clerk of the Crown has framed it. The Jury have not found the intent as set out in the finding.—[BURTON, J. Does not the word conspiracy imply intent?—It may, or may not, but we wish to have the benefit of it, if there be any thing in it.

The *Attorney-General*.—No such application as the present has been ever before made. A new trial having been moved for, and refused by the Court, it is now sought to make another application founded on the same grounds on which the previous motion was refused. They wished to have entered on the record the separation of the Jury. It never was the practice to allow these amendments after the first four days of Term. A copy of the record in *The King v. Kinnear* has been sent to me, and it establishes, that it was usual for Jurors in misdemeanor cases to separate. There is no precedent for this application. The *postea* has been correctly made up; *The King v. Carlisle* (b).

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This motion cannot be granted without violating a compact made between the respective Counsel at the trial, as to permitting the Jury to separate; there is no reason to alter the *postea*: for first, the application should have been made within the first four days of the last Term. A motion was made to set aside the verdict, and it was grounded on the *postea* as it then stood, and the traversers cannot now quarrel with it; and that is the second reason for refusing this motion: for having used

(a) 2 B. & A. 462.

(b) 2 B. & Ad. 364.

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BURTON, J., concurred.

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As to the first part of this motion with regard to the separation of the Jury, if we granted it, the Court would be ancillary to a breach of faith: the consent on the part of Counsel, as to the Jury separating, was full and explicit. We are called on to direct an amendment as if the finding of the Jury were a partial finding; and to pronounce what was the main question, was the only question not decided by the Jury: that would not be putting forth the truth on the record. I therefore concur in refusing this motion.

PERRIN, J.

As to the alteration of the finding, I think the application is founded on a mistaken notion of the issue-paper; that is but an abstract sent up to the Jury, a memorandum for their convenience to mark the several parts of the charge on which to find the defendants guilty or not; and when the Clerk of the Crown receives the abstract, it is his duty to ask the Jury if they find guilty in manner and form as therein set forth. That part of the application, therefore, should be refused, no matter at what time made. As to the separation of the Jurors; the consent entered into implied that no future advantage would be taken of such separation; and, therefore, I think this motion must be refused.

May 27, 28, 29.

On motion in arrest of judgment on conviction for a conspiracy—

SIR COLMAN O'LOGHLEN, on behalf of Daniel O'Connell, moved that the judgment in this case be arrested. He relied on two grounds; first, that the caption of the indictment was bad in form; and secondly; that

Held—It is no objection to the caption of an indictment, that it does not state who of the Jurors who found the indictment were sworn, and who affirmed; or that those who so affirmed had a right so to do. Such objection is met by 6 & 7 Vic. c. 85, s. 2.

Held also—A count in an indictment for a conspiracy, charging two offences of the same nature and growing out of the same transaction, is not bad for duplicity.

An objection for duplicity is not tenable on motion in arrest of judgment.

Held also—That the judgment cannot be arrested for the vice of the indictment, if any one count be good.

Held—That a finding by the Jury against a traverser upon part of a count in an indictment for a conspiracy, does not vitiate the judgment.

Held—To make a combination amount to a conspiracy, it is not necessary that the act agreed to be done to effect the common object, be indictable.

Held—that the mere agreement to commit an offence is a conspiracy, although no act is done in execution of the scheme.

the traversers had not been found guilty of any indictable offence, for that the parts of the indictment upon which they had been found guilty were bad in law.

The objection to the caption is, that it states the indictment was found upon the oath and affirmation of twelve good and lawful men, then and there sworn and affirmed; and it is not stated who were sworn and who affirmed; and whether those who affirmed had a right to be so affirmed. In support of the objection, *Rex v. Dan** was cited; and it was contended that the 6 & 7 Vic. c. 85, did not apply to a case like the present. As to the indictment, it was said that the first five counts were bad for duplicity, and on this point were cited—2 *Gab. Cr. Law*, 204; *Arch. Cr. Pl.* 51; *Rex v. Inhabitants of Trowbridge* (a); *Rex v. Cranburne* (b); *Rex v. Roberts* (c); *Rex v. Polman* (d); 1 *Chit. Cr. Law*, 168–250; *Rex v. Turner* (e). Secondly—that the indictment did not disclose a legal crime; and in support of that position were cited—21 *Ed.* 1, defining what was conspiracy: *Rex v. Turner* (f); *Rex v. Richardson* (g); *Rex v. Mawbey* (h); *O'Meally v. Newell* (i); *Hay. Cr. Law*, 623, n. d.; *Rex v. Lawley* (k); *Rex v. Joliffe* (l); *Rex v. De Berenger* (m); 1 *Hawk.* 644; 2 *Stark. on Slan.* 220; *Rex v. Vaughan* (n); *Clifford v. Brandon* (o); 6 *Went.* 446; *Ventus v. Clive* (p); *Rex v. Edwards* (q); *Rex v. Tarrant* (r); *Rex v. Warne* (s); 2 *East, P. C.* 823; 2 *Chit. Cr. Law*, 36; *Rex v. Dixon* (t); *Rex v. Lyme* (u); *Rex v. Pywell* (v); *Rex v. Rispal* (w); *Poulterers' case* (x); *Rex v. Seward* (y); *Rex v. Biers* (z); *Rex v. Knight* (aa); *Rex v. Cheese* (bb); *Regina v. Vincent* (cc); *Rex v. Reeves* (dd); *Rex v. Phillips* (ee); *Rex v. Griffith* (ff); *Rex v. Loughnan* (gg); *Rex v. Sparling* (hh).

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(a) 7 B. & C. 262.

(c) Carth. 226.

(e) 1 Chit. R. 58.

(g) 1 M. & R. 403.

(i) 8 East, 365.

(l) 4 T. R. 285.

(n) 4 Burr. 2494.

(p) 4 Burr. 2472.

(r) 4 Burr. 2106.

(f) 3 M. & Sel. 11.

(v) 1 Star. 402.

(x) 9 Cok. 56, c.

(z) 1 Ad. & E. 328.

(aa) 1 Ld. Raym. 529.

(cc) 9 C. & P. 91.

(ee) 6 East, 474.

(gg) 1 Cr. & Dix, C. C. 79.

• 1 M. C. C. 427.

(b) 13 St. Tr. 234.

(d) 2 Camp. 229.

(f) 13 East, 228.

(h) 6 T. R. 619.

(k) 2 Stra. 904.

(m) 3 M. & Sel. 67.

(o) 2 Camp. 369.

(q) 8 Mod. 321.

(s) 1 Stra. 644.

(u) 2 T. R. 733.

(w) 3 Burr. 1520.

(y) 1 Ad. & El. 706.

(bb) 4 B. & C. 992.

(dd) 2 Peak. N. P. C. 85.

(ff) Ven. & Scri. 612.

(hh) 1 Stra. 497.

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Sir Colman O'Loughlen having closed—

Mr. Fitzgibbon applied for liberty for each traverser, through his Counsel, to address the Court on this motion in arrest of judgment.

Per Curiam.—We cannot hear more than two Counsel on this motion. The rule of the Court is against such an application.

The *Solicitor-General* was then heard on behalf of the Crown, and was replied to by Mr. Macdonagh; and the *Attorney-General* had the final reply.

The *Attorney* and *Solicitor-General*, for the Crown, cited as to the caption—*Anonymous* (a); *Dick. Quar. Sess.* 109. As to the indictment—1 *Chit. Cr. Law*, 159-170; *Regina v. Vincent* (b); *Regina v. Shellard* (c); *Res v. Hollingbury* (d); *Res v. Hinchy* (e); *Res v. Gill* (f); *Regina v. Parker* (g); *Regina v. Purchase* (h); 2 *Leach*, 799; *Russell Cr. Law*, 695, n.; *Hunt's case* (i).

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In this case the different members of the Court concur, at least substantially, in their respective views upon the subject; and are all of opinion, that upon this application there is no ground for arresting the judgment of the Court.

Two grounds have been put forward, essentially different from, and altogether independent of each other: one resting on the objection taken to the caption of the indictment, and the other on the objection to the indictment itself. With regard to the first objection, I hardly think it was very seriously put, or very strongly pressed; but on this I entertain no doubt, that there is not the slightest foundation for the objection. That objection is, that it does not appear what were the names of the several persons who acted as Grand Jurors upon the finding of this indictment; and what were the religious opinions of those persons, whether as requiring to be sworn or affirmed. The answer to this appears to be the universal practice both in England and Ireland, and until a case be found in which that universal practice has been set aside, where I am not convinced that there is any thing like a rational ground to arrest the judgment on the merits, I will not go against the practice in

(a) 9 C. & P. 78.

(c) *Ibid*, 276.

(e) *Batty*, 509.

(g) 3 Q. B. R. 298.

(b) 9 C. & P. 275.

(d) 4 B. & C. 329.

(f) 2 B. & A. 204.

(h) *Car. & M.* 620.

(i) 3 B. & Al. 567.

both countries. The fact of the existence of that practice has been ascertained in various ways. The Attorney-General has referred to reports of the most authentic nature, having the sanction of the House of Lords, and others sustained by the deliberate rules of the Judges; and all concur, that it was sufficient that the caption should, upon the face of it, state what the caption in the present case does, namely, that the Jurors were sworn and affirmed. I therefore am of opinion that there is no solid ground for that objection.

Now, with regard to the objection arising on the face of the indictment itself, I was a good deal struck by the statement made by the Solicitor-General, and the references made by him to the opinions and sentiments of some of the ablest Judges that ever adorned the Bench,—men respected for their learning and experience, amongst whom were to be found Lord Hale, Lord Kenyon, Lord Ellenborough, and Lord Mansfield, all of whom concurred in opinion, that technical objections go nothing to advance justice, and their advice is, that such technicalities as tend to defeat rather than promote justice are to be discouraged. Lord Hale says, “More offenders escape by the over easy ear given to exceptions in indictments than by their own innocence; and many serious and crying offences escape by these unseemly niceties.” That opinion is further confirmed, I will not say further, for it requires no confirmation, by Lord Kenyon, in 1 *East*, 314; by Lord Ellenborough, in 5 *East*, 260; and by Lord Mansfield, in 1 *Leach*, 383; there are some other observations reported of other Judges in conformity with those, which I do not think it necessary to refer to.

The present indictment is one for a conspiracy—that is the offence charged, and it states that the traversers (who may now be considered as reduced to seven), “unlawfully, maliciously and seditiously, contriving, intending and devising to raise and create discontent and disaffection amongst the liege subjects of our said Lady the Queen, and to excite the said liege subjects to hatred and contempt of the Government and constitution of this realm as by law established; and to excite hatred, jealousies and ill-will amongst different classes of the said subjects, and to create discontent and disaffection amongst divers of the said subjects, amongst others, her Majesty’s subjects serving in her Majesty’s army; and further contriving, intending and devising, to bring into disrepute and to diminish the confidence of her Majesty’s subjects in the tribunals duly and lawfully constituted for the administration of justice; and further, unlawfully, &c., by means of intimidation, and the demonstration of great physical force, to procure and effect changes to be made in the Government, laws and constitution of this realm, as by law established.” Now, I cannot understand the argument in reference to these words, “as by law established,” as giving any different rule to the words of the indictment, than if these words were left out. It is said that the

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word "intimidation," used in the indictment, had no legal meaning, but I do not see that it required any great astuteness to give a meaning to the word by using the term "fear." These were all preliminary matters, but I should think the indictment was good, if all this preliminary matter were left out—it might be all surplusage, but it certainly does not weaken the indictment by the averment of this introductory matter.

The agreement to do an unlawful act was the offence charged, and notwithstanding all I have heard, I cannot see that there is any solid distinction between a confederacy and a conspiracy. Here is what they have conspired for—[His Lordship went over the first count of the indictment (a).]—It has been always considered, that what is by law established, could not be broken down without a violation of the law, and such violation of the law was a criminal offence. It is said with a great deal of confidence, that this indictment, which is divided into no fewer than eleven counts, contains upon no part of the face of it an indictable offence. By those who appear for the traversers it is also said, that it is liable to an objection of a technical nature, because it contains what may be called double matter, that is, two offences in the same count. First, I should say that this objection does not prevail with regard to any but the first five counts, for the last six do not involve the subject matter of two offences, but severally relate to one only. But another reason which would prevent my yielding to this objection, if I thought the traversers were right in the way they put it, is this, at this period of the proceedings I do not apprehend an objection for duplicity would be tenable at all. We have now arrived at a period of the proceedings in which every thing in the way of arrangement and detail has been gone through, when the Jury have found a verdict, and nothing requires further explanation, and no reason exists for saying there may be confusion. All is gone by; it appears from the opinions of the Judges, in the cases referred to, that they all concur in opinion that a statement of an objection for duplicity, if entertainable at all, is only entertained to avoid inconvenience and confusion. There is a mode of proceeding the parties might have resorted to, if they had any grounds for doing so; they might have applied to the Court to quash the indictment, by reason of the want of simplicity and unity appearing on the face of it. Another reason for not yielding to this objection is, I do not at all subscribe to the proposition, that an offence of this nature would be a matter to be called double, if two offences appeared in the same count because they are from their nature *ejusdem generis*, they appear growing out of one and the same transaction, the same danger, the same amount of guilt, they are all misdemeanors and nothing more; therefore adopting the view of my predecessor in the *King v. Forbes*, I should say with him, there is no reason for the intro-

(a) *Ante* 262.

duction or application of the doctrine of duplicity, because there is no danger of confusion or inconvenience arising from the duplicity.

Now then, I come to the consideration ; is there upon the face of this indictment, or upon any one count of it, one offence laid which the law would take notice of ? I was surprised to hear it said that there was no offence laid in any one count of this indictment. I need not say, that the judgment will not be arrested, even though one or more of the counts were insufficient ; provided there be any one not the subject of objection it will be sufficient to support the indictment ; nay more, if the material part of one count remains untouched, that will be sufficient to sustain the indictment. I was considering this question upon the first count ; and, although it might appear that a certain thing laid there did not amount to a criminal offence, yet that would not invalidate that count, provided any one thing remained untouched which could not be displaced, establishing the guilt of the parties. Now then, is there any thing in this count to say that the traversers are guilty of a crime ? The first intent charged is, that they did “unlawfully, maliciously and seditiously combine, &c., to raise and “create discontent and disaffection amongst the liege subjects of our “Lady the Queen ; and to excite such subjects to hatred and contempt of the Government and constitution of this realm as by law “established.” That is not stated to be the act of one individual, but the act of two or more of the seven conspirators, who had, one and all, united in one common design, namely, “to excite such subjects to hatred “and contempt of the Government and constitution of this realm as “by law established.” That, I think, is an offence subject to an indictment. Is the Court to be told, that any number of persons are to be at liberty to enter *ad libitum* into plots of that kind, and yet, that they are guilty of no offence ; but on the contrary that it was perfectly legal, and perfectly constitutional, not only in individual persons, but in large multitudes to band and conspire for the purpose of exciting, to any extent they may think fit, hatred against the Government and constitution as by law established ? Now, I shall say without more, that this charge was proved, and the law sustains that charge ; and upon that ground the parties have no right to have the judgment arrested. But, then, the indictment goes on to say : “And also to stir up jealousies, hatred and ill-will between different classes of her Majesty’s subjects, and especially, “to promote amongst her Majesty’s subjects in Ireland feelings of ill-will “and hostility towards her Majesty’s subjects in other parts of the “United Kingdom of Great Britain and Ireland, and especially in that “part of the United Kingdom called England.” Those charges have also been proved. It then says, “And further, to excite discontent and “disaffection amongst divers of her Majesty’s subjects serving in the “army.” That goes further as to the nature and character which the

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persons have who were to be excited to conspire. Now, in proportion as the office is more deserving of trust, and the more dangerous it is that that trust should be violated, so the case should be taken that it was not to be tampered with. It is not necessary, to support the charge, to prove that any one soldier has been tampered with; the act charged is enough to support the conspiracy, that is, a plan to bring about the wicked end that was entered into by those persons who have been convicted. It then proceeds, "And to bring into disrepute the Courts by law established in Ireland for the administration of justice." It is said that the Queen's prerogative in the establishment of the Courts of law, and in the appointment of Judges to preside in them, is to be violated and set aside at the option and will of any conspirator who may concoct a plan for that purpose; indeed in effect, though perhaps not in actual terms, it has been said by some in the course of this argument, that this ancient prerogative was rather an idle tale of other days, which had no reason to support it now, or which the public would not be the better of, if taken away. It is a part of the Queen's prerogative, and, although the violation of it may not amount to high treason, nevertheless, it is a direct violation of the prerogative and the rights and privileges of the Queen, and I never before heard it intimated that parties concurring to deprive the Queen of her lawful rights were not thereby guilty of sedition. These four subjects I have now disposed of, and I think it only necessary to state them seriously to convince the most unobservant persons of the iniquity of this conspiracy.

But there is another charge; it is that which avers that they have "conspired to cause and procure divers subjects of the Queen, unlawfully, maliciously and seditiously to meet and assemble together in large numbers at various times, and at different places in Ireland, for the unlawful and seditious purpose of obtaining by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force, at such assemblies and meetings, changes and alterations in the Government, laws and constitution of this realm as by law established." Why, during the progress of this trial we have heard a great deal of discussion as to the influence of public opinion, and the right of the subject to entertain particular opinions, and to endeavour to bring others over to those opinions, if he did not interfere with public rights. But what is the meaning of this proposition? That it is perfectly lawful, perfectly constitutional, that laws are to be passed without bias, without force and without fear. Can they be said to be so, if the Legislature are to be overawed by the proceedings of conspirators, by the means of immense masses of persons collected together through their desire and by their command, with the view, and for the express purpose of thereby causing and procuring alterations to be made in the laws and constitution? Is that free discussion? Is the

Legislature to be placed in the situation of legislators, sworn to pass laws for the benefit of the kingdom at large; and are they to be told they are to act under the direction and command and fear of those hundreds of thousands who are thus assembled together for some purpose or another, of which they were to take notice?

Now, that is one of the offences of which those persons have been severally and respectively found guilty, and yet, we are told that there was no legal offence, but that this was perfectly constitutional. We do not want to discuss again the question as to what the particular definition of a conspiracy is, whether it must of necessity be a conspiracy by agreement to do an illegal thing, or a criminal thing—that is not necessary for us to discuss, though, if I were to give an opinion upon it, I should decidedly say there were cases in abundance in which it was laid down, that there are many things, which an individual by himself may do, if he thinks proper, and which would be in no way criminal, yet, if he associates and conspires with another to do the same thing, such a thing would become criminal by virtue of that conspiracy. That is my view, and so far from being of opinion that there is no offence spread upon the face of this indictment, I am of opinion that there are several offences stated, and laid therein, of a grave, serious and dangerous character. I should say, there is sufficient in almost every one of the counts to sustain this indictment, even though on one or more of them there might be a difficulty arising, more, perhaps, from the ingenuity of Counsel than from the real merits of the case. But if there were an objection to the first five or six counts, or any of them, of the nature suggested, it would be easy, to avoid discussion, to pass them all by, and take any of the remaining counts. There are these grave and dangerous offences set out in a way which requires no further certainty; the Jury have convicted upon every one of them, and I cannot see why the judgment should be arrested.

It is said, that there is a want of certainty, or a want of particularity, because, in stating the conspiracy the indictment has not stated the mode of carrying it into effect, and because, when it stated the means of doing it were by inflammatory speeches, it had not set out what the words and speeches were. I cannot conceive that necessary in the instance now under consideration; the thing was prospective. It was not descriptive of events already passed, but descriptive of future events that were to be brought into operation, by persons who, alone, were capable of saying the mode and extent of the speeches they intended to make. There appears to be a distinction between an indictment describing matters of fact which had taken place, and events that were to follow; the former must be stated with clearness and certainty. Upon these grounds, I am of opinion, that there is no reason for the Court to say that the judgment ought to be arrested.

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The objections upon which the Court are called on to give judgment may be brought within a narrow compass, because we cannot arrest the judgment, if there be a single count which sustains that judgment; it is only therefore necessary to see if there be any one count in the indictment upon which judgment ought to be given, and upon which, if judgment were given, it would be a valid judgment. Now, it was necessary for the Counsel for the traversers to lay before the Court such arguments as would satisfy us, not only that there was a defect in some one count, but that every one was defective, and so substantially defective as not to warrant a judgment. With all the ability that has been brought to bear upon the subject, they have not succeeded in establishing this proposition. I might rest my judgment upon this one proposition, but I should not wish, in this case, to be reduced to the necessity of adopting that rule of law, and say because one single count is sufficient, that therefore all the others are to be taken as insufficient. I think no such thing.

It is needless to go through all the counts; but with regard to the allegation of duplicity, I do not apprehend that objection has been sustained as to any one of the first five counts. I am not prepared to say that the judgment could be taken advantage of in this way; however, it is unnecessary to consider that, as I do not think that there exists any duplicity. Although in a grammatical sense, any thing not entirely single, which comprehends one or two propositions, must be considered double; yet we are to consider this in its legal sense, and looking on it thus, I have no hesitation in saying that the allegation of duplicity is untenable. The charge in the indictment is of one conspiracy; there is nothing double in that; it does not mean a conspiracy to do a single act, because persons may conspire to do several acts; and the cases which have been cited are conclusive upon that head. It is not the less a single conspiracy, although it may consist of several distinct acts, to make the purpose complete. The case is not as if the indictment charged a conspiracy for one unlawful purpose; and therefore as to the first five counts, I only say that I am clearly of opinion that the objection does not lie.

I must say further, although with more distrust of my opinion, that the argument founded upon the circumstance of a verdict having been found upon some counts against some of the traversers upon particular parts of the conspiracy, that therefore that has the effect of authorising the Court in staying the judgment. I think that is not so; and that in this case of an indictment for a conspiracy, it does not operate in that way.

There is another part of the case on which several cases were cited, and which ought to be considered with caution. It is said that a con-

spiracy is a criminal act, and in order to be punishable it must be in itself a criminal conspiracy—that is, a conspiracy for a criminal purpose; so far as that goes, I accede to the proposition: but then it is contended, that if every one of those persons were to do certain acts by himself, and that he was charged individually for those acts, he could not be punishable criminally, and consequently would not be liable when he concurs in the design to do that act, that for that design he cannot be punished as for a conspiracy. That is a difficult proposition to lay down, when you consider the acts stated in this indictment; they are acts which are only capable of being committed by a number of persons, or which could not be committed by any person alone; for if you can suppose any person exciting intimidation in the Legislature, who would say that would not be criminal? and yet it is said, that if he be incapable of doing that, it does not become a crime until he engages some others to join him in it; if it be possible to be done, it is a crime when done. It is not necessary to go further; but if I were, I should not be prepared to accede to the argument, and to say that no indictment for a conspiracy would lie except the act would of itself, if done by a single person, be indictable. I think that abstract proposition cannot be supported. It is contended that the act must be indictable if done by the individual singly, to constitute it a legal offence; but that is laying down the proposition too largely. I apprehend it is sufficient if the act were punishable, whether by common law or ecclesiastical law: if punishable, there is a conspiracy; but supposing it not punishable, yet if it could not be committed by a single individual, it becomes indictable if committed by several.

I am therefore of opinion that the objections cannot prevail.

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CRAMPTON, J.

This is a motion to arrest the judgment, upon the ground that the record is fatally defective. Two objections have been taken: the first is to the caption of the indictment; and the second is to the body of the indictment itself.

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The objection to the caption of the indictment is met at once—its answer is the statute of the 6 & 7 Vic, c. 85, s. 2; and the reference to Baron Alderson's direction on this subject, as appearing in 9 Car. & Payne, p. 78. The learned Baron is there reported to have directed (in consequence of the passing of an Act of Parliament analogous to that to which I have just referred), that the caption of all the indictments then before him should be framed precisely in the form, and in the terms, in which the caption now objected to has been framed; this objection, therefore, is untenable.

The second objection, which is to the sufficiency of the indictment, is

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twofold: first, it is argued by the defendants' Counsel that the present indictment does not disclose upon the face of it any indictable offence: and secondly, that if there be any offence, yet it is charged with such vagueness and uncertainty, that no judgment can be pronounced upon it. The universally admitted rule in *criminal* cases, "that the judgment "cannot be arrested for the vice of the indictment, if any one of the "counts of which it is composed be good," made it necessary for the defendants' Counsel to show that each and every one of the eleven counts of this indictment is bad; and the argument was this: the first five counts are bad for duplicity, or, if single, yet coupled with the findings of the Jury, which acquit some of the defendants of parts of these counts, they become such that no judgment can be pronounced upon them; and all the eleven counts equally are subject to the common vice, that they do not disclose any indictable offence, or, at all events, with sufficient certainty for the Court to act upon them.

Now, as to the objections to the first five counts, growing out of this alleged duplicity and the finding of the Jury upon them, I do not think it necessary to pronounce any opinion upon the present occasion; for I am clearly of opinion that the remaining six counts are all good counts, both in form and substance. But, I desire not to be understood as saying that the first five counts are, in any respect, objectionable. I only say, that, having satisfied my mind that this motion must be refused upon *other* grounds, I have found it unnecessary to enter into the consideration of the effect of the findings of the Jury upon the first five counts. The defendants are bound, upon this motion, to show us that no indictable offence is sufficiently charged in any single count of this indictment. They must show us that, on the face of this indictment, no crime is charged—or, at least, no crime is sufficiently charged; *i. e.* they must either show us that the indictment is substantially bad, or that it is fatally defective in its form. Both they have undertaken to do.

And, first as to the form. It is said that the offence, if any, is stated with such vagueness and uncertainty, that the Court can pronounce no judgment upon this record. Now, in answer, I have only to observe that the charge in all the counts of this indictment appears to me to be sufficiently clear and explicit. I see neither vagueness nor uncertainty in it. The charge, such as it is, cannot be mistaken; and general though its form be, we have had numerous cases and authorities brought before us, in which the charge of conspiracy is laid in terms more general and less precise than it is laid here. In truth, the plea in this indictment seems to have followed the common form of statement, applicable to such cases. Where the conspiracy and its object are clearly stated, the indictment is certain enough.

I, therefore, pass to the other and more important branch of this objection, which is, that no charge, amounting to an indictable offence,

is disclosed by this indictment. This is, indeed, a strong and startling proposition of the defendants' Counsel; and, to exhibit it in its true character, let me here unfold from the record the substance of that charge, which is thus said to involve no criminality whatever in it. It is this,—that it is no crime to conspire to create disaffection in the Queen's subjects, to excite hostility and hatred towards the Government and constitution, to excite hostility in the Irish people towards their fellow-subjects of England, to excite disaffection in the Queen's army, to prejudice the administration of justice by bringing the established tribunals of law into disrepute, and to assemble multitudinous masses of persons, at different times and different places, to be excited and agitated by seditious speeches and publications, for the purpose of intimidating the Government and both Houses of Parliament, and thereby procuring important changes in the laws and constitution of the realm. We are gravely told in this Court of law, that there is nothing criminal in a conspiracy, unlawfully and seditiously, to take all this series of seditious proceedings. Now, I must say that a more monstrous, a more unfounded, or a more unconstitutional doctrine never was propounded in or out of any Court of Justice. But I go on to the indictment.

In order to maintain this novel and dangerous proposition, the Counsel are driven to the necessity of inventing a new definition for the crime of conspiracy. They reject the old and established definition, because it is inconsistent with their argument. The old definition tells us, that conspiracy is an agreement to effect an unlawful object, or to effect a lawful object by unlawful means; and this is the definition we find in all our elementary writers, and in all the cases which, during this discussion, have been cited by the Counsel on both sides—not excepting the very late case of *The Queen v. O'Connor*, so much relied upon by the defendants' Counsel. There Mr. Baron Rolfe lays down the doctrine of conspiracy, exactly as all other Judges before him had done, and never thought of this new-fangled definition of conspiracy, as now, for the first time laid down by Counsel in this Court.

The argument upon this matter appears to be rested upon two radical mistakes—two mistakes in point of law. The first mistake is, that in order to make a combination amount to a conspiracy, the act agreed to be done to effect the common object must be an indictable offence. The second mistake is, that the acts by which the objects of the conspiracy, as charged by this indictment, were to be effected, are not criminal or indictable acts.

This novel definition of conspiracy (I think) is not only newly made—and newly made for this particular case—but it is utterly irreconcilable with numerous authorities referred to during this discussion, and with the principles and reasoning upon which all those cases are founded. Many of these are cases of conspiracies to effect a purpose by acts which could

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not be made the subject of any indictment—by acts which, done without any combination, are in themselves lawful. The case of the cardmakers—the case of officers simultaneously resigning their commissions—the case of the Cambridge jailors, and many others, are cases of this description. In opposition to this new doctrine, I should say that the gist of conspiracy lies in the *act* of combining, and in the *motive* to injure; and though the acts, separately taken, may not be illegal in themselves, yet, if several persons will combine to do such acts for the purposes of injury, then the idea of conspiracy is filled up. I will not say every kind of injury—but when the injury intended is an injury to the Crown, or the public at large, it is an injury to religion or to public morals, or to public decency, or to the important rights of individuals; the combination to work such an injury, or to use such means to effect a purpose of any kind, amounts to a conspiracy. I have here enumerated (as the elementary writers do) several classes or heads of conspiracy, in addition to that class or head which effects its object by means of criminal acts; but the learned Counsel for the defendants would cut off at once all the other heads of conspiracy, and retain but the one head or class, viz., that whose object is to be achieved by the medium of indictable offences; and this same view of the nature of conspiracy is that taken by Mr. Baron Rolfe, in that able charge of his, which, with Sir John Bailey's charge, in *Rex v. Hunt*, are held up to us as the model charges to which all future charges are to be conformed. That learned Judge illustrates the subject thus:—"You may refuse to deal with your baker, and so may others; but if you combine with others not to deal with him, and to do what is in your power to prevent others dealing with him, though the act of each, taken separately, would be lawful, yet the agreement so to act in combination, makes a conspiracy."

The second mistake in the argument, founded upon definition of conspiracy is, its assertion that the acts charged upon this indictment to be the means for affecting the common object, are not criminal or indictable acts. What! Is it not criminal, unlawfully and seditiously, to assemble vast multitudes together; to excite them by seditious and inflammatory speeches and libels, to hostility to the Government and the Legislature, with the avowed intention thereby to intimidate the Government and the Houses of Parliament, and thus compel a repeal of the Act of Union? "But, forsooth, these vast assemblies are legal; they are unarmed, peaceable, orderly and obedient to the voice of their pacific leader, who commands them to obey the law and commit no breach of the peace, and, therefore, there can be no intimidation—it is repugnant to suppose there could."

'Tis true mere numbers will not make illegality; nor can armed numbers, *per se* make an assembly unlawful. Multitudes may meet together for innocent, nay, for laudable purposes; and we often see numerous

bodies of armed men assembled on parade, and these armed numbers are a terror only to the disloyal. But, may not this regularity, this order, and perfect obedience of these pacific masses to the voice of their great leader and his officers, be a demonstration more formidable to thinking men and to the Government of the country than the casual assemblages of riotous and tumultuous bodies, however numerous and mischievous these latter may be? Whatever, therefore, be the true character of these monstrous meetings, the assembling of them for the purposes and with the unlawful and seditious motives established by the verdict now before us, and the other seditious acts disclosed by this indictment, appear to me to be in themselves illegal acts,—acts of a highly criminal character,—and I add, it would be a serious reproach to our law, if such acts did not amount to indictable offences,—sedition and libel would then have a legal license to protect them; but it is an error to suppose that the law can only deal with acts of violence and force; its arm is neither so short or so weak, that it cannot reach and chastise also such practices as these. The common law of this realm is (and I trust ever will be found to be) strong enough, and comprehensive enough, to restrain and punish every invasion upon the laws and constitution of the realm, whether that invasion be attempted by force or by fraud.

On the whole, I am clearly of opinion, that we cannot arrest the judgment in this case.

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I do not think that this motion in arrest of judgment is sustainable. There is nothing in the objection made upon the caption. In considering the other ground of objection so elaborately argued—namely, to the sufficiency of the counts of the indictment, that there are some defective in form as multifarious, and others in substance; that they do not charge any crime or offence prohibited by law; I shall assume the definition of conspiracy to be a confederacy to do or effect a criminal matter or act; to do or commit some matter or act which, if committed or effected, would be criminal and punishable as a crime—whether that criminal matter or act be the ultimate or an intermediate purpose of the conspirators; whether it be the end or object of the conspiracy, or merely the means of attaining an end or object otherwise innocent. I use the term “criminal” rather than “indictable;” because I consider a confederacy to effect a transgression against, and punishable by the ecclesiastical law, or the recognised military law, or the common or statute law of the land, to be an offence at common law, and to amount to the crime of conspiracy—a consideration that explains many of the cases and authorities upon the subject, and reconciles some apparent incongruities; I say

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some, for several of the cases reported cannot, in my judgment, be maintained. I think it unnecessary to consume time in enumerating and discussing them; but shall abide by the definition I have stated, and which has not, I think, been impugned by the Counsel for the traverser. If such a conspiracy be formed and entered into, the offence of conspiracy is complete, whether the object and end of the conspirators be attained or not; or whether the criminal matter or act intended be committed or not.

I now proceed to examine the sixth, seventh and eleventh counts by this standard or test, passing those prior to the sixth, on account of the questions that may be raised upon the findings on them.

The sixth count charges a conspiracy to cause and procure the people to assemble in large numbers at various times and places in Ireland, in order by intimidation to be thereby caused by the display of great physical force thereat, to obtain changes and alterations in the Government, laws, and constitution.

The seventh is to the same effect, adding, "and especially to bring about and accomplish a dissolution of the Union."

The eleventh charges a conspiracy to cause large numbers to assemble at divers times and places, and by unlawful and seditious speeches and publications, to intimidate the Houses of Parliament, and thereby cause changes and alterations to be made in the laws and constitution.

They each charge in substance a conspiracy, systematically to collect assemblies of large numbers of the people, at various times, in various districts throughout Ireland, in order and so as to excite and cause intimidation by the exhibition and demonstration or display of those numbers, and of their great physical force, and by that intimidation to obtain and effect changes in the laws, Government and constitution; that is, by large assemblies and display of the force or power of masses of the people to intimidate, and by the intimidation to compel changes to be made in the laws, Government and constitution. The eleventh count adds, by seditious speeches and publications to intimidate Parliament, and thereby effect the changes.

It appears to me that they each charge a confederacy to do and effect a highly criminal act or matter, viz., to effect what could not be without offence, assemblies of large bodies and masses of people in order and so as to excite and cause intimidation by the exhibition and display of their numbers and force, to such a degree as to compel or thereby to obtain, it is the same thing, changes in the laws, Government and constitution. Suppose an assembly of a large mass of people, so large as by its numbers to be formidable and capable of exciting intimidation and dread either in the well-affected members of the community, or in the Parliament, or in the executive government, calling for, and declaring that they would have, announcing an intention to obtain, a

change in the laws, Government and constitution, not by petition to Parliament, but by the intimidation and dread they were capable of exciting, of their thews and sinews, and holding out that if their views or demands were not met or conceded they would again assemble. It does appear to me that such an assembly, armed or unarmed, would be an illegal assembly, and that every member of it would commit an indictable offence—that it would be most dangerous is obvious. Such an assembly, collected in order to create intimidation, that is dread of their physical force, and means of intimidation, or violence, that is, of using such force, and by that intimidation, by the dread and apprehension of the force exhibited, of the resort to, and use thereof, to obtain or compel, or extort the changes demanded or required, would appear to me, to be collected to display, in the demonstration of physical force, nothing short of the power of insurrection, for the purpose of causing the changes sought, thereby, and by intimidation, menace, or dread of insurrection. An offence next in degree, the next step, to the offence of using such power and means for that purpose; it is to threaten so to use it, if demands not conceded, to threaten insurrection or civil war, collecting and exhibiting the dangerous means to do so, and would be a misdemeanor on the verge of treason.

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A conspiracy to collect and induce large bodies of the people so to assemble at various times and places on a system to display the power, to commit that dangerous offence, in order to obtain or compel changes in the laws and Government, is, in my judgment, a crime of no small magnitude—a conspiracy to carry out the intimidation or the threat into action, has been held to be an overt act of treason. My opinion therefore is, that each of these counts does substantially contain and charge a distinct and specific offence—namely, that of a conspiracy to commit a serious misdemeanour.

This doctrine does not, as supposed in argument, infringe or encroach on the right of petition, nor the right to assemble in numbers to any extent for that purpose; or for the discussion of grievances—real or supposed,—in order thereto, although it may remove or nullify that pretence as a cloak or veil for sedition or terrorism.

These counts would not be sustained by mere proof of a combination to collect large assemblies, to discuss and find fault with any law or statute, to express and disseminate disapprobation of the Union, to petition for its repeal, to express and exhibit in strong language their sense of its impolicy, and expose what they conceive and may call its injurious or disastrous effects, or the ills of a provincial government; nor to collect the people in such numbers that the expression of their opinion must, from the mere circumstance of so many persons having so assembled, to express their opinion, have great and powerful influence, and go far to produce

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the change desired, from its moral weight, and the regard, if not respect, due to the opinion of a large portion of the people, as well by those who entertain different sentiments, as by the Government and Legislature.

If the evidence were merely that numbers were, or were to be, convened by concert in large bodies to declare their censure and disapprobation of the Union—their anxious desire for its repeal—their determination to persist in application to Parliament until the object was attained; that exciting and inflammatory banners and placards were exhibited, and strong speeches and declarations made in favour of a domestic Legislature, and against provincial government and the Legislative Union, with a view to its repeal and dissolution by Parliament: these would not support or maintain the charge in these counts of the indictment, which impute not merely a confederacy to collect large numbers to express opinions, and by the influence and effect thereof to obtain changes in the law; but a conspiracy by intimidation from the collection and physical force of those assemblies to obtain—that is, to compel those changes.

The intimidation, the intent to operate by dread, is an essential part of the charge that must have been left to and found by the Jury. It would not be sustained by mere proof of collecting large assemblies, great numbers discussing grievances, or supposed grievances, calling for and requiring in strong terms, by petition, or remonstrance, from Parliament redress and change, no more than it would necessarily be disproved by injunctions to violate no law, to preserve the peace, to commit no violence, given to and observed by the numbers so assembled: such might be part, and a very effective part of the means of intimidation, of the display and exhibition of physical force; the order, system and discipline under which the numbers were collected, dispersed and might be recombined.

But it has been objected that the means by which the object of the conspiracy is to be effected are not sufficiently shown,—against whom the intimidation is intended,—how it is to act,—how and where it is to produce the changes sought; that the charge is, therefore, vague and imperfect; it is not necessary to state the particular means by which it is to be done—it may not be possible—they may be secret—not disclosed—not devised—may be various, not defined or fixed upon; the eleventh count does state, by seditious speeches and publications to intimidate the Houses of Parliament and so produce the changes; the sixth and seventh state, by intimidation from large assemblies and the exhibition of physical force to produce the changes, by intimidation in the quarter where, or by whose co-operation the change might be hoped to be obtained, whether of the Legislative, the Executive, or the other subjects of the Queen.

It seems to me to be a mistake to say, that there cannot be a complete conspiracy to effect a criminal purpose, without an arrangement or development of the particular means by which it is to operate and be

carried out, and that with the particularity in which the contemplated offence, if completed and prosecuted as a substantive crime, must be portrayed. In my judgment it is enough if the indictment shows a conspiracy to effect a purpose, which cannot be attained by any but criminal means—whom would it be legal to intimidate for such a purpose? The Queen? the Ministers? the Lords? or Commons? or the well-affected subjects of her Majesty?—the means may be various: yet if all and every, coming within the description for the purpose, be criminal, though the particular means and mode cannot be set forth with precision on the indictment, while unknown and undisclosed, perhaps not matured or decided on, a conspiracy to effect such a public mischief as to compel a change of the law, Government or constitution, not by petition to Parliament or the conviction of its reason or policy, but by intimidation to be produced and impressed by the collection of large masses of people and the force thereof, practicable only by exciting dread and terror in general, or in the Government or either House of Parliament, is a formidable offence, and is not unprohibited or unrestrained by the law, until the particular means of carrying it into effect be matured, determined discovered and ascertained.

I shall not discuss the objection made to the first four counts; though I do not think them open to the objection taken of duplicity, each appears to me to charge one conspiracy only of the character, description and extent therein contained. The only serious question which could have arisen upon them, if they were the only counts in the indictment, are those I have already alluded to, which may be raised upon the findings. But, it is unnecessary for me to examine them or the other counts which I have not noticed; it is enough to say that there are three sufficient counts, which, even though not framed with the technical precision that might have been, charge grave misdemeanours, upon which the traversers have been convicted, and that therefore, in my opinion, the judgment cannot be arrested.

Observations in reference to this case now at the bar, have lately fallen in another place from a person of great weight and authority on any constitutional question, deprecating the generality and vagueness of indictments for conspiracy, the want of steady, fixed and definitive law upon the subject, and intimating that Judges have extended it beyond its proper limits. These observations deserve respect and attention in the proper place. It may be right to require more strictness and fullness; and that an indictment for conspiracy shall express the overt acts on which it is to be maintained; but such provisions, however wise and politic, must be made by the Legislature. We are bound by the law as we find it in the decisions and judgments of our predecessors; we cannot alter or overrule what we find established, though it may be called judge-made law.

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The Court will not suspend judgment in a criminal case pending a writ of error.

Mr. *Moore*, Q. C., applied to the Court to suspend their judgment on the traversers, pending a writ of error. No authority was cited.

The *Attorney-General* objected.

PENNEFATHER, C. J.

The Court are of opinion that this motion cannot be acceded to. There might be many reasons which, if the Court were empowered so to do, might induce them to come to a different conclusion; for it would be extremely distressing if the traversers, after having undergone the punishment awarded by the Court, should be placed in such a position that they would be entitled to say they ought never to have been subjected to punishment. We all feel that that would be an extremely inconvenient state of things; but so it would be in every case where parties were tried and punished, and when it afterwards appeared, on suing out a writ of error, they had succeeded in reversing the judgment on which they had been convicted. This is a matter equally to be lamented in all cases; but it is very strange that notwithstanding this, the present should be an application without precedent. The matter arises not from the Judges themselves, by whom the sentence may have been pronounced, but from the operation of the common law itself. The common law is what, in such cases, creates and makes the difficulty, and the Court has no discretion upon the subject. We are obliged to administer the law as we find it; and if a matter of this nature be sufficient to call for the interference of the Legislature—that is the tribunal which must be applied to—and unless authorities were shown to the Court coercing them, the Judges cannot interfere, but must act on the law as it stands; and they are not answerable for the consequences, however personally they may regret it.

The COURT then pronounced judgment and sentence upon each of the traversers separately, which was entered in the following manner: after setting forth the eleven counts in the indictment, with the findings upon each, it proceeds:—"Whereupon all and singular the premises being seen and fully understood by the Court of our Lady the Queen now here, it is considered and adjudged by the Court, that the said ——— *for his offences aforesaid*, do pay a fine to (her Majesty) of £——, and be imprisoned "in ——— for the term of ——— months now next ensuing; and that the "said ——— do, before some one of the Justices of the Court of ———, enter into a recognizance, to be acknowledged by him, and two sufficient sureties to (her Majesty), himself in the sum of £——, and each "surety in the sum of £——, conditioned to keep the peace, &c., for

"the space of seven years next ensuing the acknowledgment thereof. And all the said (traversers) are, therefore, committed to the custody of the Sheriff of ——. And, it is ordered that the said Sheriff do deliver the said (traversers) into the custody of——, to be severally kept in safe custody of the said prison in execution of the judgment, and until they shall have paid their said fines respectively, and have severally entered into such recognizances, and with such sureties as aforesaid, to keep," &c.

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NOTE.—To this judgment the traversers severally sued forth writs of error, *coram nobis*, and with the exception of Thomas Steele, respectively assigned for error in fact, that the bill of indictment was found a true bill upon the evidence of certain witnesses for the Crown, who were produced before and examined by the Grand Jury, but were not sworn or affirmed, and did not make solemn declaration in open Court before being so examined by the Grand Jury, as required by statute 56 G. 3, c. 87. Steele assigned for error in fact, that the indictment was not found and returned pursuant to the provisions of 1 & 2 Vic., c. 37, inasmuch as that in stating the names of the witnesses so produced and examined, and whose names were endorsed on the bill of indictment sent before the Grand Jury, neither the foreman nor any other member of the Grand Jury, by his initials or signature, as required by that statute, did authenticate the fact, that the witnesses, or any of them, had been sworn, &c., as aforesaid; nor state that no other witness or witnesses, save those named as aforesaid, was, or were examined by or before the Grand Jury. The Attorney-General having pleaded *in nullo est error* in each case, issue was joined thereon, and the judgments were respectively affirmed without argument. The traversers then brought writs of error in Parliament, and assigned, among other things for the reversal of this judgment, that the indictment was not found a true bill according to the provisions of the statute 56 G. 3, c. 87, inasmuch as the witnesses examined before the Grand Jury, and upon whose evidence the said indictment was found, were not, nor was any of them sworn in open Court; by reason whereof, the indictment was ipso facto found upon evidence of unsworn witnesses.

This objection had been brought before the Court of Queen's Bench, in the progress of the trial, on plea in abatement, and on demurrer to the pleas. PENNEFATHER, C. J., and BURTON, J., were of opinion the pleas were bad in form, not being pleaded with sufficient exactness; but CRAMPTON, J., and PERRIN, J., declined giving any opinion upon the point of form; the Court, however, were unanimously of opinion, that they were bad in substance, as the 56 G. 3, c. 87, was repealed by the 1 & 2 Vic., c. 37, under the authority of which latter Act the witnesses had been sworn; and that that Act applied to the Court of Queen's Bench as well as to the Courts of Assize and Quarter Sessions in Ireland (a). The House of Lords concurred in opinion with this Court upon the point of informality in the respective pleas; and held, that there was no ground for reversal in the judgments on the assignment of error *coram nobis*, affirming the decision that the 56 G. 3, c. 87, was repealed by the 1 & 2 Vic., c. 37; and that this latter Act applied to the Court of Queen's Bench, as well as to the Courts of Assize and Quarter Sessions; and with regard to the assignment of error by T. Steele, that it was no ground of reversing the judgment, that portion of the statute being directory only.

Another error assigned was, that the trial was not duly or regularly had, inasmuch as the same was a trial at bar, which was commenced in Term, and was continued

(a) See Arm. & T. 85.*

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into and concluded in the Vacation after Term; and there was no authority by law for continuing the trial out of Term, nor was there any proper continuance from the time when the verdict was given, to the following Term, when the judgment was pronounced. The Court of Queen's Bench refused to set aside the verdict, on the ground that the Term was improperly extended (see *ante*, p. 260), and the House of Lords concurred in that judgment, and decided that the order made by the Court of Queen's Bench was within the scope of the statute 1 & 2 W. 4, c. 81.

The House of Lords also held that the Court having adjourned on the 12th of February, when the verdict was found; and on the 15th of April, the appearance of the defendants being entered upon record, and the case continued to the first day of Trinity Term, and thence, again, to the 30th of May in said Term, was no discontinuance. That at common law the want of entry of a continuance after verdict is fatal, but when the trial takes place under a statute the rule does not apply.

Another assignment of error was, that the trial was not fairly or justly had, and was also illegally had, inasmuch as the Jurors who tried the same were selected and struck from a list of special jurors for the county of the city of Dublin, which had been fraudulently and illegally made and contrived, for the purpose of prejudicing the defendants in their trial, and which was not constituted or framed pursuant to the provisions of the statute 3 & 4 W. 4, c. 91.

This question was brought before the Court of Queen's Bench on challenge to the array, when the Court were of opinion, *PERRIN, J., dissentiente*, that the challenge ought not to be allowed (*a*). It was again brought forward on the new trial motion, and a new trial was refused upon that ground (*ante*, p. 260). When brought before the House of Lords, the Lord Chancellor and Lord Brougham were of opinion with the majority of the Judges that it was no ground of challenge; Lord Denman and Lord Campbell were of a contrary opinion; Lord Cottenham declined to give any.

Upon the objections to the indictment, the findings, the judgment and award of execution, the House of Lords were of opinion—

1st. That a count charging the defendants with conspiring, "to cause and procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, to effect changes in the Government, laws and constitution of the realm," was bad, because "intimidation" was not a technical word, having a necessary meaning in a bad sense; and because it was not distinctly shown what species of intimidation was intended to be produced, or on whom it was intended to operate.

2nd. That when the Jury found upon one count charging one conspiracy to effect certain objects, that three of the defendants were guilty generally, and that four of them were guilty of conspiring to effect some, and not guilty as to the residue of those objects, that that finding was bad in law and repugnant.

3rd. That a good finding on a bad count, and a bad finding on a good count, stood on the same footing, both being nullities.

4th. That as the indictment consisted of several counts charging the defendants with various illegal acts, some of which counts were bad, and some good, and on some of the good counts there were bad findings, and that the judgment was against each of the defendants for "his offences aforesaid," each count should be considered as charging a separate offence; and this expression, "his offences aforesaid," should be treated as extending to all the offences of which each defendant had been found guilty; such judgment could not be supported.

5th. That a general judgment on an indictment containing several counts, one of which was bad, and when the punishment was not fixed by law, could not be supported. —[See report of this case before the House of Lords, 11 Clark & Finnelly, 155.]

(a) See Arm. & T. 118.*

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MR. FITZGIBBON, Q. C., for the plaintiffs, moved that the venue in this case might be brought back to the county of the city of Dublin, from the county of Fermanagh, to which it had been changed by the defendant upon the usual affidavit, that the cause of action (if any) arose in Fermanagh, and not in the county of the city of Dublin, or elsewhere, out of the county of Fermanagh.

The action was brought to recover the price of a book called "Lewis's Topographical Dictionary of Ireland." The declaration contained several special counts, besides the common counts for goods sold and delivered, &c.

In support of the application, an affidavit was made by the plaintiffs' attorney, who deposed that previously to the publication of the Dictionary, the plaintiffs, who were the proprietors of the work, caused persons to travel through Ireland, and distribute prospectuses of the intended publication, and procure subscribers thereto; that the mode in which such subscriptions were obtained was, by the signing on the part of the intended subscriber, a note or *formula*, addressed to the proprietors, authorising them to insert the name of the party signing it, in the list of subscribers to the Topographical Dictionary: that deponent had then in his possession the *formula*, signed by the defendant in this cause, ready to be produced to the Court: that the *formula* was the document upon proof of which the plaintiffs' action was principally to be sustained: that the course of business in the obtaining of such subscriptions was, for the agent obtaining the same, to forward each *formula*, when signed, to the plaintiffs, at their place of residence, No. 87 Aldergate-street, London, where in pursuance of the authority given by the *formula*, the name of the party so signing it was entered in a list of sub-

Where the venue has been changed upon the usual affidavit, and the plaintiff can give the undertaking required by the 47th General Rule, viz., to produce material evidence in the county where the venue was originally laid, the venue will not be brought back except upon the terms of his giving such undertaking; it not being sufficient in that case merely to falsify the defendant's affidavit.

But where the plaintiff can so far falsify the defendant's affidavit as to show that the cause of action has partly arisen out of the realm, the plaintiff is entitled to retain the venue in the county where it is

laid, without an undertaking to give material evidence there, because in such case, it would be impossible to comply with the undertaking required by the 47th Rule.

Where, however, the cause of action arises in different counties in Ireland, and the plaintiff has laid the venue in a county where no part of the cause of action has arisen, he cannot bring back the venue, by showing that the defendant's affidavit is false.

Where the venue had been changed upon the usual affidavit, and a motion was made to bring it back, upon the ground that the cause of action partly arose in England, but that fact did not appear with sufficient distinctness upon the plaintiff's affidavit; the Court refused to make the order, except on the terms of plaintiff's undertaking to give material evidence in the county where the venue was originally laid, or *out of the jurisdiction*.

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scribers to the intended publication, which list was afterwards published in the work itself.

That at the time when plaintiffs were obtaining subscriptions, a prospectus of the work was extensively circulated, and published as an advertisement, and appeared repeatedly in all the principal newspapers in Ireland.

That plaintiffs, immediately after the publication of the prospectus, sent persons, by their attainments duly qualified for that purpose, into different parts of Ireland, to obtain information for their intended work; and that in the city of Dublin especially, several such persons were employed, in compliance with, and for the purpose of fulfilling the undertaking contained in the prospectus, in examining records in the Bermingham Tower, and describing the public buildings and institutions of the city; and that several of the articles in the work describing the city of Dublin were altogether written and compiled in Dublin: that the work itself was printed in London, and edited there, but that proof-sheets of the book were sent by post to persons residing in every part of Ireland, for correction; that the types from which these proofs had been struck were then broken up; and that the proof-sheets having been returned altered and corrected by the persons to whom they were sent, were reprinted.

That before the work was published, the plaintiffs had expended in the compilation and printing thereof, a sum of upwards of £30,000: that deponent was advised and believed that the whole cause of action did not arise in the county of Fermanagh (in which county, however, he admitted the signature of defendant to the *formula* had been obtained, and the books delivered), but that it arose partly in that county, partly in London, and partly in the different counties of Ireland in which the preparation for compiling and completing the work had been made: that he was advised and believed that a difficulty of a technical nature lay in the way of giving the usual undertaking to give material evidence in Dublin, because of a late trial in another case at the suit of the plaintiffs, in which the Court refused to receive evidence of the pains and expenses bestowed and incurred in the production of the book, although deponent was at the trial prepared with such evidence; and was advised and believed that the preparing and printing of the work in London, and providing in London the materials for same, and engraving there the plates for the maps forming part of the work, and particularly inserting, by the plaintiffs in London, the name of the defendant in this cause, in the list of subscribers, as they were authorised to do by the *formula* (previously to which deponent was advised the contract was not complete), were sufficient to show that the whole cause of action did not arise in the county of Fermanagh; and deponent submitted, that had those facts been stated in the affidavit of defendant, on which the order to change the venue had been obtained, such order would not have been made.

That the plaintiffs had been obliged to bring a very large number of actions to recover the amount of similar demands in Ireland, very many of which were still depending : that by means of publications in the press, a very strong feeling was excited in different parts of Ireland against the plaintiffs' work at the time of its appearance ; and that articles appeared in the public newspapers, charging that the work was full of errors and defects ; and that in its compilation, the plaintiffs had not duly fulfilled the promises and conditions of the prospectus, &c. : that in consequence of the line of defence pointed out by the public attacks on the work (and which deponent believed to be in this case the only line of defence that could be suggested), the plaintiffs were obliged, in prospect of a trial, to be prepared with evidence as to the due execution of the contract on their part, and with evidence to prove that the work was conformable thereto ; with evidence also of the several merits of the book, and which evidence must consist necessarily of the testimony of witnesses, taken from the class of men most distinguished for literary attainments and scientific information, and particularly of persons conversant with the topography and antiquities of Ireland, which (as deponent believed) was the only means of removing the prejudice excited against the work, and which prejudice must have been created and must still exist in the minds of many of those likely to be jurors on the trial of cases for the recovery of the price of the work : that such testimony could only be procured amongst men of high literary character and rank, chiefly resident in and about the city of Dublin ; as evidence of which, the affidavit enumerated the names of several literary men, who had been recently examined as witnesses by the plaintiffs, to prove the merits of the work.

That from the nature of the avocations of many of these witnesses, and from the rank and station of others, the costs of defraying their expenses and compensating them for their time would be very great ; and that it would be utterly impossible for the plaintiffs, even at any expense, or by any process of the Court, to procure the attendance of some of them in the remote counties of Ireland : that it would, moreover, be impossible for the plaintiffs to find witnesses of the necessary description, or evidence of the kind in the town of Enniskillen, or in any other provincial town : that without such evidence the plaintiffs could not safely proceed to trial in any cause in which the defendant might choose to dispute the merits of the book : that in addition to this, both the agent who took the order from the defendant, and the agent who delivered the book, were resident in England ; that almost all the agents in the employment of the plaintiffs were similarly circumstanced, and could much more conveniently, and at less expense, attend a trial in Dublin, than in any other part of Ireland : that there were defendants in causes now at issue in almost every county of Ireland ; and that deponent was at that moment pressed by defend-

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ants to try records at the next Assizes for the county of Cork, and other counties.

That the same agents were necessary witnesses in a great many of these cases, to prove the order and deliveries, without whose evidence it would be impossible for the plaintiffs to go to trial: that it was a great object with the plaintiffs to save the expense in trying any case, because every verdict which they could obtain from a solvent person, would cost them much more than they could recover from him: that in many instances attempts had been made to force the plaintiffs to go to trial with persons who were insolvent, or who had left the country, it not being always possible for the deponent or his partner to ascertain the particulars of each case: that in a great many cases, deponent, on behalf of the plaintiffs, served notice of trial and expended large sums of money in preparing for trial, when pleas of confession or consents for judgment were given before the period at which the plaintiffs could charge a considerable portion of the costs so incurred, against the defendants: that on a trial at the suit of these plaintiffs, against one T. C., the plaintiffs expended in fees to Counsel, expenses of witnesses, briefs, and other necessary preparations for the trial, a sum of between £200 and £300, whilst but a very small portion of that sum was chargeable against the defendant.

That the excitement against the plaintiffs produced by the publications of the press, extended to most of the country parts of Ireland; and that in the county of Fermanagh especially, a strong prejudice against the plaintiffs prevailed: that in the last-mentioned county, a large number of persons likely to be on the record and special juries, were subscribers to the plaintiffs' book, many of whom had not paid: that he believed from all the circumstances aforesaid, the plaintiffs could not have a fair trial in the county of Fermanagh: that he had heard it repeatedly said by professional persons concerned for defendants in causes in which Lewis & Co. were plaintiffs, that when once the venue was changed to the country, the plaintiffs might give up their case.

Some of these statements made by particular individuals, the deponent then proceeded to detail. The partner of the deponent, and one of the agents of the plaintiffs, joined in the affidavit, corroborating on belief the statements therein contained, and deposing to the fact of their having heard it stated by several persons, professional men and others, that if the plaintiffs were to proceed to trial in Fermanagh, or in any place out of the county or county of the city of Dublin, they would have no chance of obtaining a verdict.

Affidavits in reply were made by the defendant and his attorney, negating the existence of any unfair feeling or prejudice against the plaintiffs or their work, in Fermanagh, and asserting that they would have a fair and impartial trial there. The defendant also deposed, that upon a

reference to the list of subscribers, published with the work, it would be seen that with the exception of persons in Holy Orders, there were few in the list then resident in Fermanagh. He further impeached the plaintiffs' book as very incorrect, and as containing many statements erroneous, and actually fabulous as regarded Fermanagh and the adjoining counties; independently of which, he had, as he was advised and believed, in other respects, a good defence upon the merits.

He also stated, that in the event of a trial it would be necessary for him to examine several of the old and respectable inhabitants of Fermanagh, without whose evidence he could not safely go to trial, and whose attendance in Dublin would be productive of inconvenience and expense. He further added, that if the venue were to be changed from the county of Fermanagh, he would be thereby deprived of valuable and important evidence, which he would be induced to forego and dispense with, rather than subject individuals to inconvenience and himself to heavy expense.

Mr. Fitzgibbon.—The affidavit filed on behalf of the plaintiffs discloses three distinct grounds upon which they are entitled to bring back the venue; first, it falsifies the defendant's affidavit on which the venue was changed; secondly, it shows that a trial in Fermanagh would be attended with great inconvenience, loss and injustice to the plaintiffs; and thirdly, it proves the improbability there exists of the plaintiffs obtaining a verdict, or having a fair trial in that county. First—The only two facts which connect the cause of action with Enniskillen, are the signing of the *formula* and the delivery of the book there; but the contract was substantially one for a book to be published in London, where it was to be prepared and printed. The defendant signed the *formula*, and pursuant to the authority thereby conferred, his name was afterwards inserted in the list of subscribers which was kept in London, and the contract was consequently completed there. Secondly—As the defendant impeaches the accuracy and disputes the merits of the work, it is incumbent on the plaintiffs to prove that they have produced a book such as the defendant contracted for; this can only be done by the examination of witnesses of respectability, and distinguished for their learning and intellectual acquirements,—such as on a former trial were produced to prove the merits and due execution of the work. The impracticability of inducing such witnesses to go to a distant provincial town like Enniskillen, has been sworn to. By permitting this, and the other cases in which the plaintiffs are concerned, to be tried in the county towns, they would be exposed to this additional embarrassment, that as several trials might be going on at the same time in different parts of Ireland, the plaintiffs would be thereby deprived of some of their witnesses, without whose testimony they could not sustain their case. One of the peculiarities of the plaintiffs' position arises from the disproportion of the debt to the

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amount of the costs which would be necessarily incurred in proving it. The Court has power to look at all the circumstances, and on the whole of the case, to determine the course the most reasonable and just to be pursued, having regard to the rights and convenience of both parties. Thirdly—It is clear that a strong prejudice prevails against the plaintiffs and their work in Fermanagh, which would necessarily prevent them from having an impartial Jury or a fair trial there.

Mr. *John Brooke*, Q. C., and Mr. *Sproule*, contra.—It is of importance that the practice of all the Courts with respect to bringing back the venue, should be the same. The origin and history of the practice connected with changing and bringing back the venue, are to be found in the case of *Santler v. Heard* (a). In the Queen's Bench in England, the order to change the venue was always an absolute one in the first instance, and they would not allow it to be brought back without an undertaking from the plaintiff. There is but one case reported in which that Court ever appears to have deviated from its practice in this respect, and that is the case of *Cailland v. Champion* (b). In the Common Pleas in England, the practice was different; for that Court granted a conditional order in the first instance, which might be met by counter-affidavits, and the Court exercised its discretion on the whole of the case. The Court of Exchequer pursued a middle course, granting a conditional order as in the Common Pleas, but requiring an undertaking as in the Queen's Bench. In *Price v. Woodburne* (c), the Court of Queen's Bench held that although the venue were changed by the defendant upon a false affidavit, yet the plaintiff could not bring it back to the county where it was first laid, without the usual undertaking to give material evidence there. In *Emery v. Emery* (d), the Court of Exchequer held precisely the same doctrine; so also in *Whitehouse v. Hudden* (e). The Court of Queen's Bench in this country eventually adopted the practice of the Queen's Bench in England (f).

So stood the practice before the New Rule in England of 1832, (Hil. Term, 2 W. 4, s. 103), which is the same as the 47th of the New General Rules in Ireland, of Easter Term 1834.* By that rule, the

(a) 2 W. Bl. 1031.

(b) 7 T. R. 205.

(c) 6 East, 438.

(d) 6 Price, 336.

(e) 10 Price, 180.

(f) See *Crosthwaite v. Shiel*, 1 H. & Br. 122.

* 47th New General Rule of Easter Term 1834:—"In cases where the application for a rule to change the venue is made upon the usual affidavit, the rule shall be absolute in the first instance, and the venue shall not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid." See *Moore and Lowry's Rules*, p. 279; and *Yeo's Rules*, p. 71.

other Courts assimilated their practice to that of the Queen's Bench. The rule establishes this proposition: that if the defendant will swear that the cause of action arose solely in the county to which he seeks to change the venue, it is not competent to the plaintiff to bring it back to the county where it was originally laid, by showing that the cause of action arose in a *third* county. The rule indeed admits of an exception, where it *incontestibly* appears upon the defendant's own showing, that his original affidavit on which the venue was changed is untrue, and there the Court will bring it back without an undertaking from the plaintiff: *Roxburgh v. Grimshaw* (a); *Nicholl v. Hickson* (b): the principal, if not the only case decided on this point in England, since the New Rule of 1832 is *Fisher v. Waring* (c), where the Court of Common Pleas refused to discharge a rule for changing the venue from London to Glamorganshire, obtained upon the usual affidavit, although it was sworn that the cause of action arose partly in that county, and partly in Ireland. Tindal, C. J., there says, "To entitle the plaintiff to bring back the venue, there must be an affidavit of special circumstances: the language of the New Rule (Hil. Term, 2 W. 4, s. 103), is very general."—[CHIEF BARON. I have discovered two other cases which were also decided in England since the New Rule there; the first is *Hobart v. Wilkins* (d), in which it was held by Patteson, J. (one of the Judges whose names are affixed to the New Rules in England), that in an action for a libel, where the venue is laid in one county, and removed on the common affidavit into another, the Court will move it back on an affidavit stating that the newspaper in which the libel appeared is published as much in one county as the other. The other case is *Clementson v. Newcomb* (e), and there also in an action for a libel published in a country newspaper, which circulated in several counties, the Court set aside a Judge's order for changing the venue; Parke, B., observing that the order was clearly irregular, and that the venue should not have been changed, as the newspapers circulated in several counties. As these cases admit the principle, that the Courts will bring back the venue without an undertaking, where the affidavit seeking to bring it back shows the original affidavit on which it was changed to be unfounded, they certainly conflict with the opinion of Tindal, C. J., so far as it is to be collected from the case in 6 *Scott*].—If the Court were even to go the length of adopting the principle of those cases, yet, the facts of the present would not warrant its application. The action is for goods bargained for, and delivered in Fermanagh. The cause of action arose there, and the contract had no reference for

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(a) 2 Jones, 35.

(b) 2 Ir. Law Rep. 328.

(c) 6 Scott, 377.

(d) 1 Dowl. 460.

(e) 3 Dowl. 425.

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its completion either to London or to different counties in Ireland. There is nothing in the affidavits on either side to show that the defendant contracted for a book to be published in London; and unless the contract in its inception looks to its performance in a particular place different from that in which it is entered into, the cause of action arises in the place where the contract is made, and the mere circumstance of the contracting party choosing, or happening to perform the contract in a place different from that in which it is entered into, does not, *per se*, make the cause of action arise partly in one place, and partly in the other.

Secondly.—Even upon the balance of inconvenience, the defendant has a right to retain the venue in Fermanagh, as he swears, that if the trial were to take place in Dublin, he would be deprived of his most important witnesses.

The third ground also fails, as the defendant denies that the plaintiffs would not have a fair and impartial trial in Fermanagh.

Mr. *Butt*, in reply.—It is admitted on the part of the defendant that the 47th Rule is not to be construed so literally as to exclude all exceptions, and, that under special circumstances, the Court may bring back the venue without requiring an undertaking from the plaintiffs; but it is contended, that the plaintiff is not at liberty to falsify the original affidavit upon which the venue is changed. Before the New Rules, in this country, the course was, to permit the common affidavit to be met by counter-affidavits; but in practice, this was found to be productive of inconvenience, inasmuch as while the defendant's affidavit was confined to the usual form, the plaintiff was at liberty to introduce new matter into his affidavit in reply. The Courts accordingly, by the 47th New General Rule, directed that a motion to change the venue when made upon the usual affidavit, could only be met in the first instance by an undertaking to give material evidence in the county in which the venue was originally laid. The result of which is, that where the plaintiff seeks to bring back the venue on special grounds, and to be exempt from the necessity of giving the undertaking, it must be by a substantive motion.

The entire subject is reviewed in the case of *Crosthwaite v. Shiel* (a), which led to a change of practice in the Court of Queen's Bench in this country, and to its assimilation to that of the Queen's Bench in England. This practice was ultimately introduced into all the Courts by the 47th General Rule. The case last cited, as also that of *Caillard v. Champion* (b), demonstrate, that previously to the New Rules, by the practice of the Court of Queen's Bench both in this country and in

(a) 1 H. & Br. 122.

(b) 7 T. R. 205.

England, the venue might be brought back on special grounds in cases wherein the defendant's original affidavit was falsified by the plaintiff. In *Neale v. Neville* (a), and *Savory v. Spooner* (b), it was held, that where the cause of action arises in a foreign country, the plaintiff may retain the venue without an undertaking to give material evidence. The Court ought not to put so narrow a construction upon the Rule as to hold itself concluded by the defendant's affidavit, however false it may be. The reasonable construction of the Rule is, that an application to change the venue when grounded upon the usual affidavit, can only be met, in the first instance, by an undertaking on the part of the plaintiff; but that the latter is left perfectly free as before the Rule, by a separate and substantive motion to bring back the venue on special grounds. Where it appears that the cause of action partly arose in Ireland, and partly in England, the Court will bring back the venue without requiring an undertaking from the plaintiff: *Nicholl v. Hickson* (c); *Roxburgh v. Grimshaw* (d); which cases show it to be immaterial whether the falsity of the defendant's original affidavit appears from his own subsequent admission, or from facts put forward by the plaintiff.

The "formula" alluded to in this case, is merely a letter signed by the subscribers, authorising the plaintiffs' agent to insert their names in a book kept for that purpose at Aldersgate-street, London; until that was done, the contract was not complete, and accordingly the declaration contains an averment that the names were so inserted. The completion of the contract, therefore, took place in England; and the defendant, at the time he signed the *formula*, must have been well aware that he was not dealing with parties in Ireland, but was contracting for a work to be printed and published in London.

Upon the authorities, it is plain, that the cause of action arose partly in England. The *formula*, or letter signed by the defendant, and addressed to the plaintiffs, was received by the latter in England: *Seed v. Harvey* (e); the contract was completed by the insertion of the defendant's name in the subscribers' book in London; the work was delivered by the plaintiffs in London, to a person by whom it was subsequently delivered to the defendant in Fermanagh: *Powell v. Rich* (f); and lastly, the preparation of the book, which was part of the contract, took place in London, where it was also printed and published. The cause of action, therefore, arose in all its material parts in England.—[CHIEF BARON. Are the plaintiffs, then, prepared to enter into an undertaking to give material evidence either in Dublin or out of the jurisdiction?]
The Court will not require an undertaking where the defendant's affidavit

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(a) 6 Taunt. 565.

(c) 2 Ir. Law Rep. 328.

(e) 1 Cr. & D. A. N. C. 117.

(b) 6 Taunt. 565.

(d) 2 Jones, 35.

(f) 7 Taunt. 178.

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has been so clearly falsified.—[PENNIFATHER, B. If so, the plaintiffs can have the less difficulty in giving the undertaking. Indeed, the entire argument, on their part, proceeds on the assumption that they are in a position to do so.]—The giving of an undertaking involves a professional responsibility, which it is never desirable to incur. The Court of Common Pleas permits the defendant's affidavit to be controverted by the plaintiff upon a substantive motion, and if falsified, it will bring back the venue without an undertaking: *Reynolds v. Blake* (a); *Pain v. Mathews* (b). The practice upon this subject will be found in 2 *Archbold's Prac.* 1009 (c).

Secondly.—Having regard to all the circumstances detailed in the affidavit, and to the number of actions now pending at the suit of the plaintiffs, it would be attended with great hardship and injustice to them, to allow this, or the other cases in which they are concerned, to be tried elsewhere than in Dublin. There the preparations for one trial would serve for all. By allowing this case to be tried in Enniskillen, the plaintiffs would be put to an expense far beyond what they would be entitled to recover from the defendant. From the class of persons required as witnesses on the part of the plaintiffs, it is obvious that Dublin would be the most suitable and convenient place for the trial: *Bowring v. Bignold* (d).

Thirdly.—The venue ought not to be changed to a county where there is any reason to suppose that a fair trial cannot be had: *Anon.* (e); *Vaughan v. Byrne* (f).

BRADY, C. B.

We have heard this case discussed at great length, as it is one of considerable importance as regards the parties litigant before us, particularly the plaintiffs, who are involved in so many actions in which similar questions may arise; and also of considerable importance as regards the general practice of the Court.

The motion is to bring back the venue to the county of the city of Dublin from the county of Fermanagh, to which it had been removed upon the usual affidavit made by the defendant, that the cause of action (if any) arose in Fermanagh, and not in the county of the city of Dublin, or elsewhere out of the county of Fermanagh. The plaintiffs insist that the affidavit is open to impeachment on their part, and that if they can show it to be false, it is a ground upon which the Court should interpose and bring back the venue. The main ground upon which that falsehood

(a) 1 Smythe, 470.

(c) *Et vide* 1 Tidd, 603, 9th ed.

(e) 4 Law Rec. N. S. 62.

(b) 5 Law Rec. N. S. 151.

(d) 1 Dowl. 685.

(f) Hayes, 123.

is stated to exist is, that part of the cause of action arose in London, and not in Ireland.

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Before the General Rule, there appears to have been two classes of cases (both of which have been brought under the consideration of the Court), in reference to such matters. One was where the cause of action arose in several counties within the realm, and where the plaintiff laid his venue not in any one of them, but in some other county, in which no part of the cause of action arose. If he laid the venue in any county where part of the cause of action had arisen, there would not have been any difficulty, because he would have been put to the ordinary undertaking to give material evidence in that county; but where he laid the venue in a county where no part of the cause of action had arisen, the Court would not, as ruled by the Queen's Bench in the case cited from 6 *East* (a), bring back the venue merely by the plaintiffs showing that the defendant's affidavit to change it was not true *in omnibus*, because part of the cause of action had arisen in another county;—and the reason assigned by Lord Ellenborough for the decision was, that the plaintiff had brought the mischief upon himself by originally laying the venue in a county where he could not give the undertaking,—having in the first instance an option to choose one of the several counties in which the cause of action had arisen, and which would have enabled him to give the undertaking there.

The other class of cases was where, although part of the cause of action arose in the country to which the defendant had brought the venue by the rule to change it, it appeared on the facts of the case (and the plaintiff was left at liberty to show these facts), that part of the cause of action also arose out of the realm. In this class of cases, the plaintiff was allowed by the practice of all the Courts in England, to retain the venue where he had originally laid it. So in a case before the Queen's Bench in this country—*Crosthwaite v. Sheil* (b)—where part of the cause of action arose abroad, the plaintiff was allowed to retain the venue in the county where it was laid, without an undertaking to give material evidence there; and that, upon the ground that he *could* not give such undertaking; consequently, that in such a case it is considered to be sufficient for the plaintiff to falsify the affidavit of the defendant, by showing that part of the cause of action arose out of the county in which the defendant by his affidavit had sworn that it had arisen.

The matter, however, to be thus falsified must constitute part of the cause of action; as we find that the same Court which decided the case in 6 *East* (a), within four years afterwards, discharged a rule to bring back the venue to the county where it was originally laid, because the plaintiff could not give the usual undertaking there, although his

(a) *Price v. Woodburne*, 433.

(b) 1 Huds. & Br. 122.

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affidavit showed that a fact essential to his succeeding in the action occurred out of the realm. I refer to the case of *Guard v. Hodge (a)*, which was an action for *crim. con.* with the plaintiff's wife; and the venue had been changed from Middlesex to Devon, upon the usual affidavit that the whole cause of action (if any) arose in Devon, and not elsewhere. The plaintiff obtained a rule *nisi* for discharging the former rule, and bringing back the venue upon an affidavit that the marriage of the plaintiff with his wife had taken place in Ireland; and Lord Ellenborough (the same Judge who had decided the former case) discharged the rule to bring back the venue, merely on the ground that the proof of the marriage was no part of the cause of action, although a material inducement to the right of the plaintiff to maintain it.

This brings the case to the construction of the 47th General Rule of the Courts, the operation of which I conceive to be this: that where a party can give an undertaking to produce material evidence in the county where the venue is originally laid, he can only discharge the rule to change it by giving such undertaking; and that in a case where the cause of action has arisen in different counties in Ireland, and the plaintiff has laid the venue in a county where no part of the cause of action arose, he cannot bring back the venue by showing that the defendant's affidavit is false, and the case remains as before the rule.

Where, however, he can so far falsify the defendant's affidavit, as to show that part of the cause of action arose *out of the realm*, there he may retain the venue without giving the usual undertaking, because it would be impossible for him to do so; and the 47th Rule does not, in our judgment, coerce the Court to require it. These distinctions are alluded to by Gibbs, C. J., in the case of *Savory v. Spooner (b)*, where he says, "Not to limit the expression of the rule to these particular instances, the general rule is this: the plaintiff, in order to retain the venue, must undertake to give material evidence in that county, from which, if the venue had been laid there, the defendant, by reason that some part of the cause of action really arose there, would not be entitled to change the venue; that is, in the case where the action arises partly in each of several counties, the plaintiff shall undertake to give material evidence in one or other of those several counties. The merely swearing that the cause of action arose elsewhere will not suffice; he shall follow up his affidavit with this test of its truth, that if the cause of action does not arise in one or other of the counties in which it is sworn by the plaintiff that it did arise, the plaintiff shall be nonsuited." He adds, "In a case where it may be proved that the cause of action arises abroad, there the rule must be simply discharged, for it will be impossible to give evidence in any particular county."

On these grounds, we think, that if it clearly appeared in the present

(a) 10 East, 32.

(b) 6 Taunt. 568.

case, that part of the cause of action arose in London, it would be a ground for retaining the venue in the county of the city of Dublin, without requiring the usual undertaking from the plaintiffs. Upon reading the affidavit made on the part of the plaintiffs, however, the question arises, have they shown that? Now, the affidavit has not been made by the plaintiffs, or by the party who witnessed the signature of the defendant to the *formula* in question. It has not been made by a person who can state any thing that occurred between the defendant and himself. The affidavit merely states the belief of the party making it, that the signature to the *formula* is the handwriting of the defendant; but, whether it was signed in conformity with the authority given by that *formula*, does not appear.

It appears, no doubt, that this book was printed in London; but the question remains, what is there before us, to show that the defendant contracted for a work to be published in London? There is no evidence of a contract for a work to be published there. I do not rely merely on the generality of the plaintiffs' affidavit in this respect, as we put it to the test of asking the plaintiffs' Counsel, whether they would enter into an undertaking to give material evidence arising in England; but this they declined to do; so, that upon this part of the case, the plaintiffs have by no means made it so clear, that part of the cause of action arose out of Ireland.

On the part of the plaintiffs, it has been also asserted, that a fair or impartial trial cannot be had in Fermanagh; but I confess, it does not appear to me, that any satisfactory grounds have been stated in the affidavit for any such supposition. There is no impeachment of the integrity of the Jurors there; and, I apprehend, there will be found in that county a sufficient number of gentlemen quite competent and intelligent enough to decide upon any questions that may be raised in these cases. That ground, therefore, for changing the venue, also fails.

However, upon another ground, it is contended that the plaintiffs are entitled to try the case in Dublin, viz., on the balance of inconvenience to which they would be put in trying it in Fermanagh, as it would be necessary for them, as they allege, to bring down persons of intellectual attainments and of scientific acquirements there, which, it is said, would be attended both with inconvenience and expense to the plaintiffs. No doubt, several persons of that description were examined before me, upon a former occasion, in an action at the suit of the present plaintiffs; and such evidence must greatly have influenced the minds of the Jury in favour of the plaintiffs.

On the other hand, the defendant says he cannot safely go to trial without the evidence of several gentlemen who reside in Fermanagh, and and of whose evidence he would be deprived if the case were to be tried in Dublin. Besides, several local inaccuracies of detail are imputed by

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If the plaintiffs be embarrassed in this respect, they have only themselves to blame for it, as the embarrassment has been occasioned by their own act. They might have published the book, and trusted to the chance of their being able to dispose of it in the usual way;—or another course was open to them—viz., not to send the book to those subscribers who had not paid for it; but they have chosen a third course, that of merely getting signatures or subscriptions in the first instance, to a proposed work without actual payment, and then seeking by action to enforce the performance of the contract; and they must be prepared to meet the inconveniences which this course of proceedings has entailed upon them.

Under all the circumstances, therefore, of this case, considering the defective statement of the affidavit on the part of the plaintiff, and the balance of inconvenience to the parties, and there being no reason to suppose that a fair and impartial trial cannot be had in Fermanagh, we think this motion ought not to be granted without the plaintiffs' entering into an undertaking to give material evidence, either in Dublin *or out of the jurisdiction*.

ORDER.—It is ordered by the Court, that the venue in this cause be brought back from the county of Fermanagh, to the county of the city of Dublin, on the terms of plaintiffs' undertaking to give material evidence on the trial of the issue in this cause, arising either in the county of the city of Dublin, *or out of the jurisdiction of the Court*; and in case plaintiffs shall not succeed on the trial, defendant to have the costs of this motion; and in case plaintiffs shall succeed, plaintiffs to have the costs of this motion, to be taxed as a motion to bring back the venue on an undertaking to give material evidence, not including the costs of the affidavits.

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BERNARD MAGUIRE, Gent., one of the Attorneys.

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MR. MACDONAGH, Q. C., for the defendant, moved to make absolute the conditional order of the 10th of May last, that the plea of confession filed in this cause, the judgment had thereon, and all subsequent proceedings should be set aside, and that defendant should be at liberty to plead to the plaintiff's declaration.

Long and conflicting affidavits were filed on both sides, minutely detailing a variety of bill transactions, in which the plaintiff and defendant had been mutually engaged.

The defendant, in that portion of his affidavit which more immediately related to the subject of the present application, deposed, that he gave to the plaintiff the acceptance of one M. C., for the sum of £83, for the purpose of discounting the same, and for which bill, the plaintiff gave him a sum of £74, deducting the difference, as he alleged, for discount and commission. That the acceptor of the said bill, before it fell due, applied by letter to the plaintiff to renew it, which he consented to do on the terms of getting £6 in cash and a renewed bill for £92, of which defendant was to be the drawer; and that accordingly such new bill was given to the plaintiff, which included £10, or nearly, for discount and commission, although he received a sum of £6 in cash for the discount of such new bill; and that at the same time plaintiff insisted on, and obtained from the defendant, a plea of confession for the amount of the new bill, with stay of execution until the day the bill would become due.

That when the second bill was about falling due, the acceptor thereof again applied to the plaintiff to renew that bill, which he refused to do; but after some negotiation he agreed to take the draft of defendant on one G. B., at two months for £100, thereby charging £7 for the discount of the new bill, and at the same time required and obtained from defendant a plea of confession for the sum of £112. 15s. 6d., payable on or about the day the acceptance of said G. B. would fall due, and thereby charging £18 or £19 for discount; and that plaintiff kept the said bills of M. C., and the defendant's former plea of confession, and refused to give them up, although required so to do by the defendant. That the plaintiff

The practice of requiring pleas of confession to be given contemporaneously with securities by bills or notes, is an improper practice, and one which is strongly discountenanced by the Court.

A plea of confession given by an attorney before action brought, is not invalid, and a judgment entered thereon will not be set aside.

Quære—If it would be otherwise in the case of an ordinary individual giving a plea of confession previously to a writ sued out, or an action commenced against him?

Quære—whether the following clause of statute 2 & 3 Vic., c. 37, "any contract for the loan or forbearance of money, above the sum of £10 sterling," is to be construed as a

general clause extending to *any* contract for the loan or forbearance of money above the sum of £10; or whether it is to be restricted to contracts for the loan or forbearance of money upon the faith or security of bills or notes?

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had caused the last plea of confession by defendant so given to him for the sum of £112. 15s. 6d. to be filed in this Court with a declaration on said bill of exchange, the acceptance of G. B. for the sum of £100, and had, without notice to defendant, marked a judgment thereon and threatened to issue an execution grounded on said judgment against the defendant for the full amount thereof, and that the only notice he received of the proceedings was a bill of costs thereof with which he had been furnished, and a summons to tax the same, without the name of any attorney annexed thereto. That defendant was advised and believed he had a just and legal defence upon the merits, and that on an account taken between him and the plaintiff on foot of the several bills mentioned in the affidavit, it would appear that defendant received no value or consideration for them. He, therefore, called upon the Court to set aside the plea of confession obtained in the manner therein mentioned before any suit or action was commenced, and for a supposed debt to become due two months after the giving of the same, and to allow him to file an issuable plea in this cause.

The account given by the plaintiff in his answering affidavit of the circumstances connected with the plea of confession, was to the following effect:—That the defendant having applied to him for cash advances on certain securities, and amongst others, on the acceptance of the said M. C., for the sum of £83. 19s. (and not for the sum of £83 as alleged by the defendant in his affidavit), the plaintiff was induced to discount this bill, for which he gave a full and *bonâ fide* consideration. That it was untrue, that M. C. ever applied to plaintiff to renew the bill, but that the defendant himself did so shortly after it fell due, promising that it would be punctually paid. That plaintiff accordingly renewed M. C.'s acceptance for the sum of £90 (and not for the sum of £92 as stated in defendant's affidavit), and that it was untrue that plaintiff either required or received a plea of confession for the amount of the renewal.

That when the renewal became due it was not paid, and that the defendant again applied to plaintiff and entreated him to renew the bill, whereupon, the latter was again induced to accept a further renewal of the same for the sum of £93. That on the said last mentioned bill having arrived at maturity, the plaintiff wrote to M. C., complaining of his having permitted his first acceptance and the said renewal to be dishonoured. That, in reply to this communication, M. C. expressed his surprise that the defendant had not settled the amount of the acceptance as he had promised to do; that in consequence of M. C.'s answer, the plaintiff wrote to the defendant complaining of his breach of faith in relation to the bill; and that after some further correspondence and communication with the defendant, the plaintiff received from him the following letter, dated the 20th of February, 1843:—

"I, this day, hand you my draft, accepted by G. B. Esq., dated the 16th instant, at two months for £100, for you to hold as a guarantee or counter security for the acceptance of M. C. for £93 due 1st February, instant, and on which (*i. e.* the £100 bill) I am endorsed; and also give you my plea of confession for the amount. Now, in case Mr. B.'s bill is not duly paid, I hereby agree that same is in no manner to be considered any settlement or payment of said M. C.'s bill, but you shall be at liberty to proceed thereon, and on my plea of confession, as if said bill of Mr. B.'s had never been given."

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That shortly after the receipt of this letter, a personal interview took place between the plaintiff and defendant, at which the former expressed his unwillingness to accept G. B.'s bill as a security, whereupon the latter proposed to give his (the defendant's) plea of confession, and to include therein a sum of £12. 15s. 6d., which had been due to plaintiff by the defendant, as the balance of an account previously settled between them. That the plaintiff having agreed to accept the plea of confession so proposed to be given by the defendant, it was accordingly prepared and filled up by the defendant himself (as one of the attorneys of the Court, and as the defendant therein), for the said sum of £112. 15s. 6d., with stay of execution until the 20th of April 1843. That this was the plea on which judgment had been marked in the present case. That it was untrue that judgment had been so marked without notice to the defendant, inasmuch as subsequently to the last-mentioned bill having arrived at maturity, and the stay of execution having expired, frequent applications had been made to the defendant, requesting him to settle the amount, with which, however, he had neglected to comply; and that judgment was not marked until the 2nd of May. The plaintiff further asserted that he did not include in the several bills and renewals mentioned in his affidavit, more for discount and commission than the defendant expressly agreed to allow, or than was fair and reasonable under the circumstances. He also alleged that it was untrue that the plea of confession was given, as averred by the defendant, for a supposed debt not to become due for two months after it was given, but on the contrary, had been given under the circumstances thereinbefore mentioned, for a just debt then due and unpaid.

Mr. *Macdonagh*, Q. C., and Mr. *Baker*, for the defendant.—This transaction is not protected by the 2 & 3 Vic. c. 37, or the previous Act of the 3 & 4 W. 4, c. 98.* The objection on the part of the defendant is,

* The 3 & 4 W. 4, c. 98, s. 7, exempts from the operation of the laws relating to usury, bills of exchange and promissory notes made payable at or within three months after date, or not having more than three months to run. The 7 W. 4, and 1 Vic. c. 80,

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that contemporaneously with the indorsement of the bill a plea of confession was given; the latter, and not the former, being the security really stipulated for and relied on by the plaintiff. The practice of demanding pleas of confession when discounting bills, is a clear violation of the law against usury, and has been recently condemned in no measured terms by the Court of Queen's Bench, who in the case of the Queen at the prosecution of *Woodroffe v. Birch*, actually refused to make absolute a conditional order for a criminal information for what was admittedly a gross libel on the character of the prosecutor, because he had not come into Court with clean hands, by a denial of the imputation that he had

extended that exemption to bills and notes not having more than twelve months to run, but limited the period of exemption to the 1st of January 1840.

The 2 & 3 Vic. c. 37, extended the period for two years, being entitled "An Act to amend, and extend until the 1st day of January 1842, the provisions of an Act of the first year of her present Majesty for exempting certain bills of exchange and promissory notes from the operation of the laws relating to usury."

The first section is as follows:—"Whereas by an Act passed in the first year of the reign of her present Majesty, intituled 'An Act to exempt certain bills of exchange and promissory notes from the operation of the laws relating to usury,' it was enacted, that bills of exchange payable at or within twelve months should not be liable, for a limited time, to the laws for the prevention of usury: and whereas the duration of the said Act was limited to the 1st day of January 1840; and it is expedient that the provisions of the said Act should be extended: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, *nor any contract for the loan or forbearance of money above the sum of ten pounds sterling*, shall by reason of any interest taken thereon and secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating or transferring *any such bill of exchange or promissory note*, be void, nor shall the liability of any party to any *such bill of exchange or promissory note*, *nor the liability of any person borrowing any sum of money as aforesaid*, be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons or body corporate drawing, accepting, endorsing or signing any such bill or note, or lending or advancing *or forbearing any money as aforesaid*, or taking more than the present rate of legal interest, in Great Britain and Ireland respectively, for the loan *or forbearance of money as aforesaid*, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture; any thing in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding: *provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements or hereditaments, or any estate or interest therein.*"

The passages in *italics* were not in the former Acts.

By the 3 & 4 Vic. c. 83, the 2 & 3 Vic. c. 37, was continued until the 1st of January 1843. By the 4 & 5 Vic. c. 54, the 3 & 4 Vic. c. 83, was continued until the 1st of January 1844; and by the 6 & 7 Vic. c. 45, the 2 & 3 Vic. c. 37, is continued until the 1st of January 1846.

been the introducer of this system of demanding pleas of confession on discounting bills,—a practice which is alike oppressive and unjust.*

Another objection to this practice is, that it is a manifest evasion of the late Act for the Abolition of Arrest.—[CHIEF BARON. The same objection would be applicable to a bond and warrant of attorney.]—In *Berrington v. Collis* (a), it was held that a loan upon usurious interest secured by the deposit of a lease and a warrant of attorney, was not brought within the protection of the 1 Vic. c. 80, by the addition of a promissory note as a further security. The principle of that case is precisely applicable to, and should govern the present. The plea of confession having been the primary or actual security, this case is not within the protection of the 2 & 3 Vic. c. 37, which is confined to contracts or loans upon the security of bills of exchange and promissory notes, or upon security in some way connected with their negotiation. The words, “nor any contract for the loan or forbearance of monies, above the sum of £10 sterling,” when taken in connection with the context, and the general objects of the Act, can only mean a loan or forbearance of money on the faith or security of bills of exchange and promissory notes.—[LEFROY, B. It may be asked, if that clause were general, and intended to apply to *all* loans above the sum of £10, *cui bono* restrain its provisions to a particular class of bills and notes not having more than twelve months to run?—Yes, it is not likely that the Legislature should mix up an enactment of so comprehensive a character, and amounting to so important an innovation on the usury laws, with the provisions of a statute expressly passed for the purpose of construing previous enactments (b), exclusively conversant with bills of exchange and promissory notes.—[LEFROY, B. In putting this construction upon the Act of the 2 & 3 Vic. c. 37, you have, however, to encounter a difficulty arising from the proviso at the end of the first section, “That nothing therein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein.” By introducing this exception excluding *landed* security, does not the Legislature seem impliedly to include securities of any other kind?—In this case, however, a plea of confession was given, enabling the party at once to obtain a judgment, which is a security or lien upon lands, and is therefore within the very terms of the proviso.

Secondly, this judgment cannot stand, having been entered on a plea of confession given before any debt was due, and also before any action was commenced or writ sued out: *Davis v. Hughes* (c); *Walker v.*

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(a) 7 Scott, 302.

(b) *Viz.*, 4 W. 4, c. 98, s. 7, and 7 W. 4, and 1 Vic. c. 80.

(c) 7 T. R. 206.

* See a report of this case, 2 Legal Rep. 61.

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Wodley (a); *Wade v. Swift (b)*. These cases show that a *cognovit* or plea of confession, given where a cause has not been instituted, is invalid, unless it was voluntarily given by the defendant for his own accommodation and in order to save expense. This was not the case of a *debitum in presenti solvendum in futuro*, no debt having been due by the defendant at the time the plea was given, as he was merely the drawer of the bill indorsed by him to the plaintiff, and consequently liable only in default of payment by the acceptor.

Mr. *Fitzgibbon*, Q. C., and Mr. *J. D. Fitzgerald*, contra.—The plaintiff, in the first place, denies that more than £6 per cent. interest or discount has been charged on this bill.—[The COURT, however, intimated that they were of a contrary opinion.]—Even so, the transaction is neither illegal nor usurious. By the 2 & 3 Vic. c. 37, the plaintiff was at liberty to take any amount of interest or discount he pleased, upon the bill, and there is no case deciding that a plea of confession, given by way of anticipation at the time the bill is passed, upon the supposition that it will be dishonoured, is usurious, or that a judgment entered by virtue of such a plea is illegal. No undue advantage can be taken of a plea of confession, where, as in this case, it contains a stay of execution until the bill becomes due. Notwithstanding the assertion which has been made to the contrary, it is clear, from the affidavits on both sides, that the loan was *bonâ fide* upon the security of the bill, and not on that of the plea of confession; and *Berrington v. Collis (c)* is therefore a direct authority against the defendant. Tindal, C. J., there says, “We are of opinion, that the “proper conclusion to be drawn from the evidence by a Jury at *Nisi Prius*, would be, that the loan was agreed upon and entered into “between the parties as a loan upon the security of the deposit of the “lease of the defendant’s leasehold dwelling-house, and that the security “of the promissory note and warrant of attorney were added to the “security of the deposit, for the purpose of legalizing the demand of “interest beyond £5 per cent.” In that case, the Court came to the conclusion that the primary security was the equitable mortgage, or security on the land, and the inference is, that had they arrived at the conclusion that the loan was entered into on the security of the promissory note and warrant of attorney, the transaction would have been legalized by the Act of Parliament. Indeed this was expressly decided in *Connop v. Meaks (d)*. So also in *Ex parte Knight, In re Pownall (e)*, where a creditor having advanced money to a bankrupt by discounting

(a) 7 T. R. 207, note.

(b) 8 Price, 513.

(c) 7 Scott, 307.

(d) 2 Ad. & El. 326; and see *Vallance v. Sidel*, 6 Ad. & El. 932.

(e) 1 Deac. 459.

bills payable within three months from the date, and on the security of a deposit of goods, had taken more than £5 per cent. for the interest, it was held that the transaction was protected by the 3 & 4 W. 4, c. 98, s. 7, and that the contract was not usurious.

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Secondly.—The judgment is not invalid or irregular, either on the ground that the plea of confession was given before the debt was due, or before a suit was instituted. As to the first ground; it is sworn by the plaintiff that a debt was due at the time the plea was given: and as to the second; the fact of the defendant being an attorney, renders it immaterial that no writ had been previously issued against him.—[CHIEF BARON. In England, considerable doubts have been entertained as to the propriety or legality of a *cognovit* being given before a writ is sued out or an action commenced. *Tidd* lays it down, that after a writ has been sued out a *cognovit* may be given; but that before action commenced, a warrant of attorney should be taken.*]—In this country it is not the practice to sue out or serve a writ when commencing an action against an attorney; and that circumstance distinguishes this case from *Davis v. Hughes* (a), and the other decisions cited for the defendant, the object of which was to prevent an evasion of the stamp duties: *Kerbey v. Jenkins* (b); *Richardson v. Daley* (c).

BRADY, C. B.

We think this motion must be refused. The application has been grounded upon the Usury Laws, and it is contended that under those laws the present transaction is wholly void; and undoubtedly, so it would have been under the law as it stood before the recent statutes. But on looking to the last of those Acts—the 2 & 3 Vic. c. 37—we think this case falls within its provisions.

I was at first disposed to think, that according to the true construction of the Act of Parliament, it extended to *any* contract for the loan or forbearance of money above the sum of £10 sterling. On considering the Act, however, I think there is a great deal of weight in what was urged by Mr. *Baker*; his argument is strengthened by the consideration suggested in the course of the discussion by my Brother Lefroy—namely, if the Act was intended to include *all* contracts for the loan of money above £10, why was a particular class of bills and notes selected as falling within its provisions? I cannot say, as at present advised, that the construction of the Act is free from difficulty.

Assuming for a moment the construction to be as contended for by Mr. *Baker*, the words of the statute would run thus:—No bill of

(a) 7 T. R. 206.

(b) 2 Tyrh. 499.

(c) 7 Dowl. 25.

* See 1 Tidd, 559, 9th ed.

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exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money, above the sum of £10 sterling, *upon the faith or security of such bill or note*, shall by reason of any interest taken thereon, &c., be void by reason of any statute or law in force for the prevention of usury. This construction would certainly meet the case put by my Brother Lefroy, during the argument, of persons negotiating for the loan of money upon the faith or security of bills of exchange or promissory notes (to which they did not become parties), by depositing them with a banker. So also, it would provide for the case of parties transferring stock upon the security of bills or notes. It may be supposed, in this view of the case, that the object of the Act was to legalize every thing connected with the negotiation of bills of exchange and promissory notes, and to do no more.

But whatever be the true construction of this Act, the present is a case falling at all events within its provisions. Here, the negotiation was for the loan of money on the faith or security of bills of exchange; and it is clear that the money was not lent on the security of the plea of confession contemporaneously given.

One of the objections urged by the defendant's Counsel against the plea of confession in this case was, that the judgment thereupon entered would be a security affecting *lands*, and therefore coming directly within the exception contained in the proviso at the end of the first section of the Act. But there is no suggestion or pretence in this case that the defendant Maguire has any lands; and therefore we cannot intend this to have been a dealing on the security of lands within the proviso in the statute.

Again, it has been argued that this plea of confession was given contemporaneously with the indorsement of the bill, and that, inasmuch as no action had then been commenced against the party by whom it was given, it is void. Undoubtedly, the Court cannot but discourage the practice of requiring pleas of confession in such cases, but at the same time it cannot control the contracts of the parties unless there be some distinct authority for doing so. Now, I have not been able to find an authority for holding that a plea of confession given by an attorney before action brought, is void. There may be some difficulty, perhaps, in the case of an ordinary person giving a plea of confession when no writ has been sued out, nor action commenced against him; but in the case of an attorney, against whom, according to the practice of the Court, no writ is sued out, as the commencement of an action, but the declaration is at once taken to the office and filed there, no such difficulty can, I think, arise.

A question somewhat similar to this came before the Court of Com-

mon Pleas in *Webb v. Aspinall* (a), where a judgment signed upon a cognovit given before declaration, was upheld, on the ground of its being conformable to the practice of the Court. The Court there says:—
 “Although a cognovit cannot, in strictness, be taken until after declaration, still, as it is the constant practice of this Court to allow judgment to be entered upon a cognovit, on the supposition that a declaration has been either filed or delivered, we must decide in conformity to that practice.” So, here we have an attorney giving a plea of confession—no writ is sued out, but judgment at once marked against him; we find that to be the practice, and that being so, we cannot take it on ourselves to say it is contrary to law.

The conduct of the plaintiff may, no doubt, be oppressive, but we cannot see our way to a decision that, merely on that account, we have power to set aside the judgment. Under these circumstances, we are therefore of opinion that the present application must be refused.

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RICHARDS, B.

I concur in the decision pronounced by the Chief Baron; but lest it might be supposed that I yielded to the construction of the Act of the 3 & 4 Vic., c. 37, contended for by Mr. *Baker*, the defendant’s Counsel, I think it necessary to make a few observations upon the case. I admit that there may, perhaps, be some difficulty in construing the Act of Parliament, but I would hesitate long before holding that it related merely to bills of exchange and promissory notes, and to contracts emanating from and relating to securities of that nature, according to the argument of Mr. *Baker*. The words of the statute are very strong to lead the mind to a different conclusion.—[His Lordship here read the first section of the Act.]

After expressly legislating for bills of exchange and promissory notes, the Act proceeds to refer to “any contract for the loan or forbearance of money above the sum of £10 sterling.” This is, at all events, apparently legislating for general contracts in general terms; and then comes the proviso at the end of the section, “that nothing therein contained shall extend to the loan or forbearance of any money upon security of “lands, tenements or hereditaments, or any estate or interest therein.” Now, this exception from the previous part of the section would be unnecessary, if it were the intention of the Legislature to confine the Act to bills of exchange and promissory notes alone. It is clear that neither bills of exchange nor promissory notes are securities relating to lands. If, therefore, we are to give full effect to the words of the statute, it would be difficult, as it at present strikes me, to confine it to the two classes of securities just mentioned.

(a) 1 Moore, 428.

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I do not, however, mean to say, that my mind is made up upon the point, but as the Chief Baron suggested a doubt with regard to the statute, I merely wish to be understood as not acceding to the interpretation contended for on the part of the defendant.

With respect to the practice of requiring pleas of confession to be given contemporaneously with securities by bill or note, I think it is a most improper one; and if the question were ever to come before the Court in a case where the party complaining was not an *attorney*, I should hold myself at perfect liberty to deal with it notwithstanding the decision in the present case.

LEFROY, B.

I concur in the judgment pronounced by the other Members of the Court, and desire to be understood as expressing my opinion in the same guarded manner. It is not to be taken that we are acting on the interpretation of the statute contended for by the defendant's Counsel; and I confess my first impression was, that the Act extended to all contracts: but whether that be the true construction or not, it is unnecessary now to determine.

Then, as to the other question—how far it may be possible to sustain a cognovit or plea of confession, taken before action commenced, from a person who is not an attorney,—we do not decide that question either. It is sufficient to say that in this case, the plea of confession was given by an attorney; and I may add that a debt was due at the time the plea was given. We therefore decide the present case on its peculiar circumstances.

Cause allowed.*

* PENNEFATHER, B., absent.

ANONYMOUS.

June 13.

This Court will not entertain a motion to take a demurrer off the file as frivolous.

MR. O'HARA, for the plaintiff, moved to take a demurrer to the declaration off the file, on the ground of its being frivolous and vexatious: *Wilson v. Tucker (a)*.

Mr. Flood, contra, stated that the demurrer had been taken *bonâ fide*, with the view of re-opening, for the consideration of the Court, the

(a) 3 Tyrw. 938.

question involved in the decision of *Roach v. Johnston* (a); and that he had accordingly signed a certificate that, in his opinion, the demurrer was tenable, pursuant to the rule of this Court made on the 26th of November 1838.*

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ANONYMOUS.

BRADY, C. B.

That rule was made for the express purpose of preventing motions of this kind; and the Court will, in every instance, give credit to the certificate of Counsel annexed to the demurrer, in pursuance of the Rule. Therefore—

Refuse the motion: the costs to abide the event of the argument on the demurrer (b).

(a) 1 Law Rec. N. S. 100.

(b) See *Anon.* 6 Law Rec. N. S. 303.

* See this Rule, *Moore & Lowry's Rules*, Append. II., p. 86.

Lessee of DOYLE v. THE CASUAL EJECTOR.

June 15.

MR. LOUGHNAN, on behalf of John O'Keeffe, a third person, moved to make absolute the conditional order of the 11th of May last, to set aside the *habere* which issued in this case (which was an ejectment for non-payment of rent), on the ground that the affidavit ascertaining the rent, did not state that a year's rent was due at the time of the service of the summons in ejectment. The affidavit stated, that there was due to the lessor of the plaintiff the sum of £31. 2s. 6d., being the balance of six years' rent.

In answer to this application an affidavit was made, setting forth that the sum of £31. 2s. 6d. was more than five years' rent of the premises.

Mr. Hobart, for the lessor of the plaintiff.—The answering affidavit supplies the defect, if there be one, in the affidavit to ascertain the rent.—[PENNEFATHER, B. The *habere* must be sustained upon the documents upon which it was obtained.]—Then, the affidavit ascertaining the rent is sufficient. The object of the Legislature in requiring the

In an ejectment for non-payment of rent, and judgment against the casual ejector, the affidavit filed pursuant to the 4 G. 1, c. 5, for the purpose of ascertaining the rent, stated that there was due to the lessor of the plaintiff, the sum of £31. 2s. 6d., being the balance of six years' rent; Held, that the affidavit was defective, in omitting to state that more than one year's rent was

due; and the Court accordingly set aside the *habere* and let the defendant in to take defence upon terms, notwithstanding a subsequent affidavit, stating that the sum of £31. 2s. 6d. was more than five years' rent of the premises.

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affidavit was, that the tenant might know the sum which he was bound to deposit in a Court of Equity in order to redeem the premises. The language of the 4 G. 1, c. 5, s. 3,* is, that the Jury who shall try the cause, or if not, the Judge shall ascertain *the sum* that shall be so due and in arrear. The affidavit in this case conforms to these requisites.—[PENNEFATHER, B. The meaning of that passage of the statute is, that the Judge shall ascertain the rent due in the manner pointed out in the former part of the section; that is, by the affidavit of the landlord or his agent, that *more* than a year's rent is due. There is no instance of an *habere* having been maintained except upon a verdict, or affidavit ascertaining that *more* than one year's rent is due.]—In *Lessee of Lowry v. M'Roberts (a)*, the Queen's Bench held, that an affidavit stating that the tenant owed to his landlord the sum of £—— (leaving a blank for the sum), being one year's rent of the premises, was sufficient.—[BRADY, C. B. That was a very different case from the present: it was a cross-ejectment; and the Court in giving judgment guard themselves from laying down any rule as to what might be the effect of such an omission on a motion to set aside the *habere*.]—If this application be granted, the plaintiff may at once make a new affidavit and issue a new *habere*. It is therefore useless.

Mr. Loughnan.—The attorney for the applicant has made an affidavit stating, on belief, that he has a good defence on the merits.

Per Curiam.

Let the *habere* which issued in this cause be set aside with costs, and let the said John O'Keeffe be at liberty to take defence to the ejectment, on the terms of his giving security for costs in this cause; and if such security be not given within ten days from this date, the lessor of the

(a) 1 J. & Sy. 144.

* The 4 G. 1, c. 5, s. 3, enacts that "As often as it shall happen, that more than "one year's rent shall be due and in arrear to any landlord or lessor, though there be "distress sufficient on the land to answer the said rent in arrear, such landlord or "lessor may serve a summons in ejectment for recovery of the demised premises; and "in case of judgment against the casual ejector, or nonsuit for not confessing lease, "entry and ouster, if it shall be made appear to the Court where the said suit is "depending, by the affidavit of such landlord or lessor, his agent or receiver; or that "it shall be made appear on the trial in case the defendant appear, that more than "one year's rent was due before the said summons was served, then and in every such "case, such landlord or lessor, his lessee in ejectment shall recover judgment and "have execution thereon; and the Jury who shall try such cases, in case it shall be "before a Jury, and if not, the Judge before whom the judgment shall be given, shall "ascertain the sum that shall be so due and in arrear," &c.

plaintiff to be at liberty to issue a new *habere* upon a new affidavit to ascertain the rent due ; the said John O'Keeffe undertaking not to bring any action of trespass for the execution of the *habere* hereby set aside ; and if the defendant shall obtain a verdict, or the lessor of the plaintiff be nonsuited on any trial to be had (with the approbation of the Judge who shall try the case), a writ of restitution shall thereupon issue to restore the said John O'Keeffe to the possession of the lands and premises of which he has been dispossessed under said *habere* ; and the lessor of the plaintiff to be accountable for mesne rates. The costs of this motion to be set off against the costs to which the lessor of the plaintiff is entitled under the order of the 11th of May last, and all the party against whom a balance shall appear due after such set-off, to pay the same.

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THE QUEEN
 At the prosecution of WILLIAM NEILSON,
 v.
 JAMES BIRCH.*

(*Queen's Bench.*)

Nov. 7.

Supplemental affidavits may be filed by a prosecutor in a criminal information in reply to those of the defendant, if such refer exclusively to new matter introduced in the defendant's affidavit.

A **CONDITIONAL** order had been obtained in this cause for liberty to file a criminal information against the defendant for a libel on the prosecutor; and affidavits were filed as cause against this conditional order, which affidavits were replied to by the prosecutor.

The *Attorney-General*, in showing cause against this order, objected to the prosecutor being permitted to use those supplemental affidavits, as being contrary to the practice. No supplemental affidavit can be made use of on an application for a criminal information.—[**PERRIN, J.** I allowed the affidavits to be filed, reserving the question for the full Court, whether or not the prosecutor was entitled to use them? If no new matter be introduced into the affidavits showing cause, I think the other side is not entitled to file any in reply; but the question appears to be whether any new matter has been introduced by the defendant, or whether these supplemental affidavits are part of the original case of the prosecutor.]—A criminal information is an application to the extraordinary jurisdiction of the Court, and the parties are not entitled to mend their hand: *The Queen v. Baldwin (a)*. It was there decided that a prosecutor could not use a statement in the defendant's affidavits to supply a defect in his own; and in *The King v. Smithson (b)*, Denman, C. J., says:—"The rule is, that when affidavits have been answered, the party moving is not entitled to file others in reply."

Mr. Fitzgibbon, Q. C., contra.—I do not contend that we are entitled to use the supplemental affidavits for the purpose of amending an originally defective case; but we seek to use them merely in reply to new matter which has been introduced into the affidavits on the other side.

CRAMPTON, J.

I think that is quite according to the practice of this Court; and there

(a) 8 A. & El. 168.

(b) 4 B. & Ad. 862.

* *Absente* PENNEFATHER, C. J.

are numerous instances in which orders have been made for using additional affidavits, not for the purpose of amending, adding to, or explaining the former statement, but for the purpose of removing any argument founded upon the introduction of new matter which could not have been originally contemplated, and that principle applies to the case of criminal informations.

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BURTON, J., concurred.

PERRIN, J.

I quite concur with my Brother Crampton; and I quite agree with the position stated by Counsel, that you cannot make a supplemental affidavit to explain the matter in a former affidavit; but here new matter has been introduced which may affect the right of the party; and I think in such a case the affidavits may be used. I believe a similar rule was made in *Lord Hawarden's case* (a): but this favour ought not to be abused.

(a) Not reported.

WILLIAM KIRKWOOD

v.

PALMER BURKE.*

Nov. 9.

ASSUMPSIT for money paid by the plaintiff for the use of the defendant, tried before Ball, J., at the Summer Assizes of 1843, for the county of Mayo.

It appeared in evidence that the plaintiff was executor of Thomas Kirkwood deceased; that by lease dated the 3rd of May 1808, John Phibbs demised to Thomas Kirkwood certain lands therein named for two lives, at the yearly rent of £140, and thereby covenanted for himself and his executors for payment thereof. Thomas Kirkwood died on the 27th of November 1836, not having disposed of by his will the lands included in the lease. The plaintiff, after the death of the testator,

Where on the death of a lessee for lives, his heir-at-law took possession of premises demised to the lessee, and the rent thereof having become due after the death of the lessee, and during the possession of the heir-at-law, the ex-

ecutor of the lessee was compelled to pay it to the lessor; *Held*, that the heir-at-law was liable to the executor in an action for the money so paid by him.

Held also, that the executor was not bound to sue in his representative capacity.

* *Absente* PENNEFATHER, C. J.

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received the arrears of profit-rent then due to the testator out of the lands. Anne Burke (the wife of the defendant), and Mary Johnston, were the heiresses-at-law of the testator; and the defendant, in right of his wife, and Mary Johnston, went into possession of the lands on the death of Thomas Kirkwood, but neglected to pay the head rent; an ejectment was then brought by William Phibbs, the heir-at-law of the lessor in the lease of May 1808, who evicted the premises for non-payment of this rent in September 1840. William Phibbs, having recovered the premises in the ejectment, brought an action of covenant against the plaintiff, as executor of the deceased lessee, for recovery of the rent due at the time of the eviction of the lease, which rent had accrued due since the death of the lessee, and while the defendant was in possession, and in receipt of the profits of the premises. The plaintiff in the present action gave a consent for judgment in the action of covenant, and paid prior to the present action to William Phibbs £50 on account of the rent, and £22 on account of the costs of those proceedings; and for those sums the present action was brought.

The defendant's Counsel at the trial contended, first, that no action lay in such a case, as it had not been proved that the sums paid by the plaintiff were paid out of the assets of the deceased; secondly, that if any action lay, it should have been a special action on the case; and thirdly, that the action should have been by the plaintiff as executor, if the payment was made out of the assets.

The plaintiff was nonsuited by consent, the nonsuit to be turned into a verdict for the plaintiff for £50 or £72, as the Court should think fit, in case the Judge was wrong in nonsuiting.

A conditional order having been obtained to set aside this nonsuit—

Mr. *Monahan*, Q. C., with whom was Mr. *I. Blake*, moved to make absolute that order.—The defendant here may be treated as assignee in possession, and as such is bound to pay the rent which accrued due during his enjoyment of the premises, and to indemnify the assignor: *Burnett v. Lynch* (a); and the same principle has been decided in equity: *Close v. Wiberforce* (b). An assignee under a will must elect to take a lease as well as other matters devised; and here having gone into possession, he must be assumed to have made that election.

The next objection is, that as we would be only liable to pay as executor, that therefore we should have sued in our representative, and not in our individual capacity; but it has been decided that an executor has the option to sue in either: *Brassington v. Ault* (c). It was there held that executors, having sold goods of their testator, and as his,

(a) 5 B. & C. 589; S. C. 8 D. & Ry. 368.

(b) 1 Beav. 113.

(c) 2 Bing. 177.

could maintain an action in their individual capacity for the price of those goods. If a person pays money under compulsion, which another ought to pay, the law implies a contract: *Grissell v. Robinson* (a). There the plaintiffs, as executors, had granted a lease of their testator's property to the defendant, and had paid their own attorney his costs for drawing this lease; and it was held, that they were entitled to sue the defendant for money paid, and that in their own right: *Pownal v. Ferrand* (b).

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As to the objection that no rent was due, we proved the lease and enjoyment under it; and it was for the defendant to show he paid the rent: and we also proved the judgment in ejectment to which he was a party. It was not necessary that we should prove assets.

Mr. *Baker*, in support of the order.—This is an action brought by the plaintiff in his individual capacity, on the ground of having paid money for the defendant's use; and in proof of that action he relies on being compelled to pay such money as the executor of a deceased testator. I admit it is optional for an executor to sue for assets that were in his possession either in his representative or individual capacity; but these were never in his possession. *Grissell v. Robinson* establishes, where the contract was made after the death of the testator, the executor may sue in his individual capacity: *Ord v. Fenwick* (c); it was there held that an executrix was right in suing in her representative capacity for money paid by her as such executrix. It is only by reason of the compulsion the plaintiff could recover at all; he therefore should sue in his representative capacity.

BURTON, J.

In this case a nonsuit was entered by consent of both parties; and it is so reported by the Judge. The question is simply, has the action been properly brought? Had the plaintiff a sufficient privity to maintain this action against the defendant? This is admitted; but should the plaintiff have shown that privity in his declaration by stating he was executor? There is nothing to distinguish this case from that of an assignee; and I therefore think the plaintiff was not bound to declare here as executor. This nonsuit must be set aside, and verdict entered for the plaintiff.

Let the cause shown against the said conditional order be, and the same is hereby disallowed with costs; and let same be made

(a) 3 Bing. N. C. 10.

(b) 6 B. & C. 439.

(c) 3 East, 103.

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absolute. Let the nonsuit had for the defendant at the Summer Assizes 1843 for the county of Mayo, before the Right Hon. Judge Ball, be set aside; and let a verdict be entered for the plaintiff for £50, pursuant to the leave reserved.

THE GOVERNOR AND COMPANY OF THE
 APOTHECARIES' HALL.

v.

NICOLLS.*

Nov. 11.

A person elected by the trustees or committee of a fever hospital to be apothecary there-to, and compounding drugs for the patients in such hospital, does not subject himself to the penalties inflicted by the 31 G. 3, c. 34, for practising the art and mystery of an apothecary without a certificate from the Apothecaries' Hall.

DEBT for penalties, against the defendant for having practised the art and mystery of an apothecary without any certificate from the Governor and Company of the Apothecaries' Hall of Ireland.

At the trial of the case at the Spring Assizes of 1843, for the county of Meath, before Torrens, J., it was proved on behalf of the plaintiffs that the defendant was elected apothecary to the Navan Fever Hospital, and had since his appointment as apothecary compounded prescriptions for the patients in the hospital.

The plaintiffs having closed their case, Counsel for the defendants then called on the learned Judge for a nonsuit, or to direct a verdict for the defendant, on the ground that the 31 G. 3, c. 34 (the statute on which this action was brought) did not apply to the case of a resident apothecary in a Fever Hospital. The learned Judge refused so to do; and evidence was then given by the defendant of his competency to act as an apothecary, by the testimony of three medical witnesses. There was no evidence of the defendant practising as an apothecary except in connection with the hospital.

The learned Judge, with the consent of both parties, directed a verdict to be entered for the plaintiffs, with liberty to the defendant to apply to the Court above to have this verdict turned into one for him, if the Court should be of opinion that the objections ought to have prevailed.

* *Absente*, PENNEFATHER, C. J.

A conditional order having been obtained in pursuance of the leave so reserved—

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Mr. *Murphy*, Q. C., with whom was Mr. *Mullen*, moved to make the order absolute.

The plaintiffs were bound to prove that the defendant was an apothecary, and as such, did acts bringing himself within the statute 31 G. 3, c. 34: *Brown v. Robinson* (a). The defendant here is practising in the employment of the trustees or committee of the hospital, and to bring him within the statute he must be shown to have opened a shop. The 22nd section is of importance, and in the 23rd section giving an appeal, it uses the words "Such person so intending to open shop;" and it authorises the College "to grant to the person so appealing such certificate as hereinbefore mentioned," that is, a certificate to open a shop, not one to practise as an apothecary. The Act is a penal one and must be construed strictly. The 26th section is the one under which they proceed, and the certificate therein referred to is the one mentioned in the 22nd section; the 27th section establishes our view, that reference is made to the opening of a shop, and not to the practising as an apothecary. We contend, that the defendant has been rendered qualified under the 54th G. 3, c. 62, s. 6, which authorises the governors of any infirmary to give a salary to an apothecary who has served an apprenticeship for making up and administering medicine in the infirmary; and in connection with this Act, the subsequent one of the 58th G. 3, c. 47, s. 3, may be considered: *The Queen v. The Treasurer of the Mitchelstown Fever Hospital* (b).

Mr. *Radcliffe*, Q. C., with whom was Mr. *Hayes* and Mr. *H. Smythe*, contra.—The preamble of 31 G. 3, is to be considered as showing what its policy was; it is admitted the defendant was elected apothecary to the hospital, and acted as such. It is not requisite that he should keep a shop: *Hogan v. Somerville* (c). The Act is not penal, but remedial.—[CRAMPTON, J. Properly, it is both one and the other.]—*The Apothecaries' Company v. Greenwood* (d). The construction of the 22nd and 26th sections is not as the other side allege.—[CRAMPTON, J. Merely opening a shop is not the thing, but opening an apothecary's shop for the purpose of carrying on the art and mystery of an apothecary.]—He might carry on the art of an apothecary without having a shop, and may incur the penalty if he practice in an hospital: *Hogan v. Somerville*. In England, great strictness has been observed with regard to persons bringing themselves within the exceptions

(a) 1 Car. & Pay. 264.

(b) 1 Ir. Law Rep. 7.

(c) 7 Taunt. 401; S. C. 1 Moor. 103.

(d) 2 Bar. & Ad. 708.

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in the English statute 55 G. 3, c. 194: *Allison v. Haydon* (a); and the words in the Irish statute are comprehensive enough to bring the defendant within it.—[CRAMPTON, J. The certificate referred to in the 22nd section is, to open shop or follow the art and mystery of an apothecary, and in the succeeding section the words are, "to open shop" merely].—In *The Apothecaries' Company v. Allen* (b), Denman, C. J., says, "It is true that the Court held, in *The Apothecaries' Company v. Warburton*, "that a man, who before August 1815, had administered medicines "without being able to make up a physician's prescription, had not "practised so as to be within the protection of 55 G. 3, c. 194, s. 20; "but it does not follow, that a person so disqualified is free from the "penalty there imposed."—[CRAMPTON, J. An apothecary's business is a trade of a public nature, whereas a person employed by a fever hospital is not a trader, he is merely doing duties under the order of superiors; the Act did not contemplate persons acting in a private house].—The 54 G. 3, c. 62, has no application here, it applies to infirmaries, not to fever hospitals.—[BURTON, J. What is meant by practising the art and mystery of an apothecary? The Act speaks of opening a shop; does it not, therefore, show that it contemplated a practising with the public, and not the case of one acting in a fever hospital? A man may not hold himself out as an apothecary, and yet he may attend a family for compounding medicines; does he come within its provisions?].—Here is a public practising, though it be restricted as to numbers. The apothecary of a fever hospital is presented for by the county.

BURTON, J.

Having stated the facts of the case, proceeded to say: Upon the best consideration I have been able to give this case, I have come to the conclusion, and I believe the other members of the Court concur, that the defendant does not at all come within the meaning or language of the statute upon which this action has been grounded. My mind has wavered much, and mainly because of the language used in reported cases on the subject. The Courts, in some cases, have taken pains to carry into effect a penalty, and in others to do away with it; but in cases of penalties inflicted by statute, the Court are bound to inquire into the meaning of the Act, and to carry it into effect. The true meaning of the language of this statute may be a matter of considerable nicety. The provision of the statute is substantially this, that no person shall carry on the business of an apothecary, by opening a shop, or carrying on the trade or mystery of an apothecary, unless he is qualified by pursuing a prescribed and particular course of proceeding. Now, the statute is of

(a) 4 Bing. 619.

(b) 4 B. & Ad. 625.

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great consequence to persons trading in the compounding of medicine, for it puts them under certain restrictions; I mean, persons who carry on that particular trade with the public; but the question here is, whether what the defendant has done brings him within the statute in question? I conceive not, neither within the statute, nor within the meaning of the Legislature.

It strikes me that the Act meant to apply to persons who carried on the trade or business of an apothecary in a public manner, or opened a shop for that purpose, because, by entering into trade, that person came within the statute; holding out to the public that he was a trader in a business which he was not duly qualified to follow. Now, I must say, not without a certain degree of doubt, I am of opinion that this case does not fall within the provision, language or meaning of the Act, because it is the case of a person who has studied the science of an apothecary, and who has been elected by a company of persons concerned for a fever hospital, who, considering his qualifications, have thought him a person fit to be employed in making up medicines for the purposes of that hospital, but that does not come within the case contemplated by the statute; it is not the case of a man holding himself out as carrying on business with the public, and that is sufficient to lead any mind to the conclusion, that this penalty ought not to be enforced, and therefore, that the conditional order should be made absolute.

CRAMPTON, J.

This Act was passed for the purpose of forming a corporation in the city of Dublin, with the view to regulate the profession of apothecaries throughout Ireland, and it recites that "Whereas not only many but great inconveniences have arisen from the want of a Hall, amply supplied with medicines of the purest quality, prepared under the inspection of persons well skilled in the art and mystery of such preparations, but also frequent frauds and abuses have been imposed and practised on his Majesty's subjects, &c., by the ignorance and unskillfulness of divers persons pretending to the art and mystery of an apothecary, to the injury of the fair trader, the disappointment of the physician, and the imminent hazard of the lives of his Majesty's faithful subjects throughout the realm," &c.; and the question here is whether a penalty has been incurred by the defendant in this case under the 26th section of that statute. Now, the defendant has been elected by the subscribers to a fever hospital, for discharging the duties therein of an apothecary, and it is said that he has incurred a penalty under that section, his duty being, under the directions of the governors of that hospital, to compound the medicines necessary for it. The words of that section are, "That if any apothecary shall have, take, indent, receive, or hire any person or persons as an apprentice, or as a shop-

M. T. 1844.
Queen's Bench.

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"man, journeyman, foreman, overseer of his shop, or manager of his business, as an apothecary, or shall open shop or ware-room for the retail of medicine, or practise the art and mystery of an apothecary, without such person or persons having obtained the proper certificate for that purpose hereinbefore directed, such person shall be liable to a penalty," &c. Has then that penalty been incurred, because the defendant has compounded medicine according to the prescriptions of the physician, in the establishment to which he was elected? The defendant has no shop in the hospital for retailing medicine; he has a room belonging to the establishment. Then, has he practised the art and mystery of an apothecary in this kingdom, within the meaning of the statute? Now, I think he has not practised as an apothecary within the meaning of the Act. It is objected that he has no certificate from the Apothecaries Hall; that may be very important, but we cannot extend the words beyond the scope of the Act of Parliament; there are two subjects of penalties in the 26th section, the opening of shop, and the practising as an apothecary. Now, the defendant has not opened shop,—has he then practised the art and mystery of an apothecary? that is, is it the case of a man compounding and retailing medicines? A mischief that the Act provided for, was the practising to the injury of the fair trader, but the defendant does nothing of the sort. To limit the Act of Parliament to the opening of a shop would be contracting the Act, but I cannot conceive the Act applies to a private establishment, where nothing is done except under the direction of the hospital committee, and where no medicine is sold. The defendant is nothing but a servant to the hospital. There is no substantial distinction between the English and Irish Act, only that the latter is more precise. *Hogan v. Somerville* does not apply. That was the case of a person libelled, and the libeller says, you cannot show you are an apothecary,—but the answer was that he was within the exception of the 14th section of the English Act; therefore it does not touch this case. The defendant here has never practised as an apothecary, except as servant to the subscribers of the hospital, and it is just the case of a private person employing another individual to compound medicines for him.

PERRIN, J.

I do not think the defendant has either opened shop or practised the art or mystery, or exercised the trade of an apothecary. An apothecary is a person who buys and prepares medicine for sale; this person did not act in this way, he merely compounded medicine for the use of the hospital, and it is plain that the Act was only intended to apply to a person exercising the trade in public.

Order absolute with costs.

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Queen's Bench.

HEMPHILL v. M'KENNA.

THIS came before the Court on a bill of exceptions.

Nov. 15.

Mr. *Macdonagh*, Q. C., stated that the junior Counsel who had been originally in the cause had died since last Term, and the parties were unable to retain a new Counsel. Under those circumstances, he wished to know if he might be permitted to open the exceptions.

A junior Counsel must always open a bill of exceptions.

Sed per Curiam (BURTON, J., and CRAMPTON, J.)—

It must stand over until the next law day; and in the meantime a junior Counsel must be retained.

THE QUEEN

At the prosecution of MICHAEL FOX, Officer of Excise,

v.

MICHAEL M'FEELY.*

Nov. 16.

MANDAMUS.—A conditional order had been obtained that a writ of *mandamus* do issue, directed to the Assistant-Barrister and the Justices of the Peace for the city and county of Londonderry, to hear and determine an appeal of the prosecutor, against the decision of George Knox and John Acheson Smythe, two of the Justices of said city and county of Londonderry, on the hearing of an information exhibited by order of the Commissioners of Excise against the defendant, for the recovery of a penalty of £100 incurred by him under the Customs Act 3 & 4 W. 4, c. 53, s. 44.

This order had been obtained on the affidavit of William Corbett, Supervisor of Excise. It set out the information, that "Michael

An appeal does not lie under 7 & 8 G. 4, c. 53, s. 32, from a dismissal by Justices at Petty Sessions of an information brought for a customs offence (under 3 & 4 W. 4, c. 53, s. 44) by an excise officer, by virtue of 4 & 5 W. 4, c. 52, s. 28.

* *Absente* PENNEFATHER, C. J.

M. T. 1844.

Queen's Bench.

THE QUEEN

v.

M'FEELY.

"M'Feely being a subject of her Majesty, within four calendar months now last past, to wit, on, &c., at, &c., did knowingly harbour, keep and conceal, and did knowingly permit and suffer to be harboured, kept and concealed divers uncustomed goods—that is to say, divers, to wit, $7\frac{1}{2}$ lbs. of tobacco, the same being then and there goods liable to the payment of duties of customs, which had been before that time illegally unshipped from a certain vessel without the payment of the said duties; contrary to the form of the statute, and so forth." It further stated "That this information came on to be heard on the 7th of March last, before two of her Majesty's Justices of the Peace for that district; and upon that occasion the defendant personally, as well as by attorney, appeared, and thereupon deponent, as well as one Michael M'Cann, were examined on the part of the prosecution, and were cross-examined on the part of the defendant, who did not produce any witnesses on his own behalf; that the case then terminated, the Magistrates dismissing the case, and acquitting the defendant of the charge in the said information: that thereupon the officer appealed from such dismissal to the next General Quarter Sessions of the Peace to be holden next after the expiration of twenty days from the said judgment of dismissal from the said city and county of Londonderry: that they were held on the 29th of March last, at which the Assistant-Barrister for said city and county presided; that the appeal was called on, when the defendant's attorney objected to the jurisdiction of the Court of Quarter Sessions to entertain or hear the same; inasmuch as the information, although exhibited by order of the Commissioners of Excise, sought to recover a penalty of £100 imposed for a breach of the customs laws of the "3 & 4 W. 4, c. 53, under which Act there was no right of appeal; that the Assistant-Barrister concurred in that view, and refused to entertain the appeal," &c.

Mr. *Major*, Q. C., showed cause.—The question here is, whether under the circumstances of this case an appeal is given. The information is filed under 3 & 4 W. 4, c. 53, s. 44, an Act for enforcing penalties for offences committed against the customs laws. The Act is solely applicable to the customs department; the 44th section creates the offence, and the 75th, 79th, 89th and 91st sections specify the mode in which the penalties inflicted by the Act are to be recovered. The 75th section directs the proceedings to be instituted before Magistrates in the name of an officer of customs, or to prosecute the offender in the Exchequer; but if the decision be against the officer, he having chosen the tribunal, as in the present case—the Petty Sessions—and no right of appeal being given by the Act of Parliament, the officer is concluded by it. This proceeding, however, is instituted by the excise department, who, under

the 4 & 5 W. 4, c. 51, s. 28, are empowered to prosecute for offences committed against the customs, but there is no right of appeal given them; there is a mere transfer of the rights of the customs to the Commissioners of Excise. By the 7 & 8 G. 4, c. 53, s. 82, the Excise Commissioners have a power of appealing; but that is only for excise offences.—[CRAMPTON, J. The question is, can section 82 of 7 & 8 G. 4, c. 53, be brought in aid of 3 & 4 W. 4, c. 53?—This is a customs offence, and if an officer of customs prosecuted here, he would have no appeal from the decision of the Magistrates; and it follows that an excise officer standing in his place cannot claim an extension of powers beyond those vested in him whom he represents; if this were an excise offence, I could not contend this general Act did not give the power of appeal. But no appeal exists here, for there are no express words giving that right to the Commissioners of Excise; the Act merely transfers to them the right of the Commissioners of Customs; and unless it can be established that an appeal is given by *intendment*, none exists. *The King v. Harrison* (a) shows that an appeal differs from a *certiorari*, which is a common law right; right of appeal exists by statute. Abbott, C. J., says:—"For the rule of law is, that although a *certiorari* lies, unless expressly taken away, yet an appeal does not lie unless expressly given by statute."

In *The King v. Justices of Oxford* (b), Lord Ellenborough says, "An appeal is not a matter of common right, but of special provision:" and so in the case of *The Queen v. Stock* (c), it was held that an appeal cannot be given by implication. *The King v. The Justices of Surrey* (d) shows that even a reference by one Act of Parliament to another will not do.

Mr. Smyly, with whom were Mr. Jebb and *The Solicitor-General*, for the conditional order.

This proceeding is for a violation of the law under the Customs Act; and although that Act does not give any right of appeal, yet the subsequent one of 4 & 5 W. 4, c. 51, transfers to the officers of excise the power of suing for any offence committed against the customs laws; have they therefore power to appeal? Under the Customs Act we would not have power to appeal; but the Act transferring the powers of suing to the officers of excise, changed offences of this description into offences against the excise laws, and gave to the officers of excise all the powers they before possessed, of suing.—[CRAMPTON, J. Do you contend that the powers possessed by the customs are transferred to the excise?—We say they have concurrent powers, and that this appeal is given by the 7 & 8 G. 4, c. 53. The words of that Act are personal, and the appeal is personal.

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Queen's Bench.

THE QUEEN
v.
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(a) 1 Chitt. Rep. 571.

(b) 1 M. & Sel. 448.

(c) 8 Ad. & El. 405.

(d) 2 Term Rep. 504.

M. T. 1844.

Queen's Bench.

THE QUEEN

v.

M'FEELY.

CRAMPTON, J.—You cannot come under the first part of this section, because the terms of it are inconsistent; you go on the words, “In case any officer of excise exhibit any information.” What kind of information is that? Not for an offence under the statute of 3 & 4 *W.* 4: and the statute 4 & 5 *W.* 4, has given you nothing but liberty to sue. I do not think there is any appeal here.

BURTON, J.—The right of appeal is given for the express purpose of taking away the necessity of a *certiorari*, and excludes the excise officer from that—that is, it throws the trouble of proceeding by *certiorari* on him; and you say that being so, the statute should be so construed as altering the mode of proceeding from *certiorari* to appeal: but you must show that the words of the statute expressly warrant that construction.

[PERRIN, J.—Your argument would go this length, that the officer of excise has a right to a *certiorari* as well as a right to appeal.]—He has; the 58th section so enacts.—[CRAMPTON, J. “Relating to the revenue of excise” means an information brought under the Excise Acts. How can you have it under the Customs Acts?—Under this 58th section.—[CRAMPTON, J. There is no appeal given by it.]

BURTON, J.

We must allow the cause shown.

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M. T. 1844.
Queen's Bench.

JOHN CONDON, Administrator of JAMES CONDON,

v.

WILLIAM RYVES.*

Nov. 19.

ASSUMPSIT.—The declaration stated, “For, that whereas the defendant, “to wit, on, &c., at, &c., was indebted to James Condon, deceased, in “the sum of £300 for the price and value of work then and there done, “and materials for the same provided by the said James Condon, in his “lifetime, for the defendant at his request. And in £200 for the price “and value of goods then and there sold and delivered by the said “James Condon, in his lifetime, to the defendant at his request. And in “£100 for the agisting of divers cattle by the said James Condon, in his “lifetime, before that time agisted in certain pastures of the said James “Condon, for the defendant at his request. And also, the said defend- “ant on the same day and year, and at the place aforesaid, was “indebted,” &c. Here followed the money counts, and the declaration concluded thus: “And, therefore, the defendant afterwards, to wit, on “the day and year last aforesaid, and at the place aforesaid, in consi- “deration of the premises, then and there promised to pay the said last “mentioned several monies respectively to the said James Condon, in “his lifetime, on request; yet, he hath disregarded his promises and “hath not paid any of the said monies or any part thereof,” &c.

Special demurrer to the first, second and third counts, assigning as cause that there was no promise alleged in them.

Joinder in demurrer.

Mr. *Michael Barry*, with whom was Mr. *Pigot*, Q. C., for the demur- rer.—There is no express *assumpsit* as to the first three counts: *Wilson v. Mitchell* (a), which decision was founded on *Harding v. Hibel* (b); *Barnes v. Keily* (c); *Mills v. Bamfield* (d). Here the uncertainty of the manner in which the *assumpsit* has been framed has been specially

A declaration stated that the defendant was indebted to J. C., deceased, in a certain sum for work and labour; and in another sum, for goods sold and delivered by the said J. C.; and in another sum, for agisting of divers cattle, without averring any promise to pay; it also contained the money counts which thus commenced: “And also, the said defendant on the same day and year, and at the place aforesaid, was indebted,” &c., and thus concluded, “And therefore the defendant afterwards, to wit, on the day and year last aforesaid, and at the place aforesaid, in consideration of the pre-

mises, then and there promised to pay the said *last mentioned* several monies respectively, to the said J. C., in his lifetime, on request; yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof.” *Held*, on special demurrer, that the first set of counts were bad as not containing a promise.

(a) 3 Ir. Law Rep. 538.

(b) 4 Tyrw. 314.

(c) Cr. & D. A. N. C. 358.

(d) 1 Ir. Law Rep. 323; S. C. 1 Jebb & S. 647.

* *Coram* BURTON, J., and CRAMPTON, J.

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relied on as ground of demurrer. The declaration in the present case is not like that in *Barnes v. Keily*, it is not one consolidated count, but three separate counts preceding the money counts, and separated by an averment of place and time.—[CRAMPTON, J. Is it contended on the other side that they are all one count?—The pleader cannot say that, for he avers that “afterwards, to wit, on the day and year last aforesaid,” words only referable to the common counts. Certainty to a common intent is not sufficient: *Co. Lit.* 303, *a. & b.* There it is said, a declaration should contain two things, certainty and verity; the declaration here is both ambiguous and uncertain; uncertain, not merely as to the monies, but on the face of it it is uncertain whether any promise was ever made to the intestate: *Price v. Easton* (a); *Bancks v. Camp* (b); that case is distinguishable from the present, for there there was a promise to pay according to the tenor of a certain instrument.

Mr. *Hobart*, with whom was Mr. *Napier*, Q. C., in support of the declaration.—If necessary, we might go the length of saying, there is but one count in this declaration; the word “whereas” is omitted, but it was inserted in *Wilson v. Mitchell*. In *Sonder v. Darcy* (c), the Chief Baron observes, “The substance of the decision in *Mills v. Bamfield* “is, that the words ‘last mentioned’ will be held to apply to every thing “to which, for the purposes of supporting the declaration, it is necessary “they should apply:” *Galway v. Rose* (d); *Cheevers v. Partington* (e). *Price v. Easton*, was an arrangement between three persons, and it became necessary by express averment to show a promise; that does not apply to an *indebitatus assumpsit* where the law implies a promise. No uncertainty is caused here by the introduction of the words “last mentioned.”—[CRAMPTON, J. The rule of the Court distinguishes between common counts and those of a different character; the common counts are those specified in the rule, and provision is there made for the insertion of the words “last mentioned;” so that when there are common counts, they may be all put together in one, and the general promise applies; but here you cannot say the counts are one common count, for there is a count for agisting.]—The rules cannot vary the principles of pleading.—[BURTON, J. Your argument would establish that the words “last mentioned” have no meaning.]—So it was held in *Mills v. Bamfield*; the forms are merely given for example. If there be no special counts the promise at the end will apply to all to which it can apply; the word “respectively” throws it back to every part of the declaration. The word “whereas”

(a) 1 Nev. & Man. 303.

(b) 9 Bing. 604.

(c) 5 Ir. Law Rep. 52.

(d) 8 Dowl. P. C. 239.

(e) 4 Dowl. P. C. 75.

distinguishes actions on the case from actions of trespass, and includes all that follows; but, if the pleader introduce a second "whereas" he divides the counts. Here it is averred "in consideration of the premises respectively;" that is important; no new day is stated, but the same day and year, &c., "hath disregarded his promises," applying thus to the whole action. The words "last mentioned" are insensible unless there be a special count, and you may reject whatever is insensible: *Welland v. Brown* (a); and surplusage is no ground of special demurrer: *Arch. Plead. and Evid.*, 98, 99, last ed.

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Mr. Pigot, in reply.—Uncertainty makes this declaration vicious; there are distinct debts, and it is impossible to say that the words "last mentioned" are insensible when each debt arises from a distinct sum of money; there must be an allegation of a promise to pay all the sums for which the defendant is indebted, and "last mentioned" must mean something different from what precedes; "last mentioned" must mean those plural sums in the last part of the declaration, or refer to the whole declaration; and thus being ambiguous, the declaration is clearly bad.

Cur. ad. vult.

CRAMPTON, J.*

We are of opinion the special demurrer must be allowed; there are two cases on the point, the one quoted from *Tyrwhitt*, and the case of *Wilson v. Mitchell*; they are quite decisive. With respect to the first set of counts, no promise is laid, and if a promise, it is not laid with sufficient certainty.

Nov. 21.

Allow demurrer with costs.

(a) 1 H. & J. 46.

* The CHIEF JUSTICE, and BURTON, J. were absent.

M. T. 1844.
Queen's Bench.

THE QUEEN,
 At the prosecution of the POOR LAW COMMISSIONERS,
 v.
 THE GUARDIANS OF THE POOR OF THE LIMERICK
 UNION.

Nov. 22.

Guardians of the poor having acted in the office as such, have no power to resign the trust so reposed in them.

In case the guardians refuse to act, the Court will not allow a *mandamus* to issue, another specific remedy having been provided by the Poor Law Act.

In this case a conditional order had been obtained, that a writ of *mandamus* do issue to the Board of Guardians of the Poor of the Limerick Union, to obey the order of the Poor Law Commissioners of the 5th of June 1844; and to meet on the day of the week and hour of the day, and at the place already appointed for holding the ordinary meetings, and hold an ordinary meeting once at least in every week, for the execution of their duties, unless cause shown in six days after the service of this order.

This conditional order was obtained on the affidavit of William J. Handcock, one of the Assistant Poor Law Commissioners, which stated that certain portions of the county of Limerick had, by an order of the Poor Law Commissioners, been formed into a union for the relief of the destitute poor: that by another order the Commissioners had directed and declared the guardians of the union so formed should, subject to the general power of the Poor Law Commissioners, have the direction and control of the union, &c.: that in pursuance of such order, the guardians appointed Wednesday in each week for holding their meetings; and that such meetings were regularly held for some time. The affidavit then set forth several other orders of the Commissioners, and then stated that on the 9th of October 1844, the *ex-officio* guardians of said union, with the exception of one, announced their intention of withdrawing from the board; and that on the same day the elected guardians, with the exception of one, tendered their resignation to the Poor Law Commissioners, which was transmitted to the Poor Law Commissioners by the clerk of the union. That in reply, the Commissioners had written to each of the guardians, refusing to accept the resignation tendered by him. That since the guardians had tendered their resignations to the Commissioners, they had not met for the discharge of business on two of their usual and ordinary days of meeting, by reason whereof the standing orders of the Commissioners were neglected.

An affidavit was made in reply to this order by William Monsell, the chairman of the late Board of Guardians, stating that he, and several others of the guardians, had acted for several successive years, and that when he had been re-elected in the month of March last, he

accepted the office in the confidence that no alteration would be made by the Commissioners in the then existing powers of the guardians. That the guardians considered it important to them in the discharge of their duties, that the clerk of the union should be under their control. That by an order of the Commissioners, dated the 3rd of May 1844, it was provided that every payment exceeding £3 should be made by a check drawn on the treasurer of the union, signed by the chairman and two guardians, and countersigned by the clerk. That by an order of the 5th of June 1844, part of the former order was rescinded, and it was provided by that order, that the guardians should pay any sum greater than £3 by an order on the treasurer, signed by the chairman of the meeting and two other guardians, countersigned, *if legally drawn*, by the clerk. That the powers which the guardians previously had of suspending the clerk was taken from them. That an order for the expenditure of a sum of £9 had been made by the guardians, which order the clerk refused to countersign. The affidavit further stated, that the guardians finding that a practical inconvenience would arise from the order removing the clerk from the control of the board, adopted a resolution calling on the Commissioners to rescind that portion of the order; which was transmitted to them, and they declined to make any alteration therein; and that thereupon the guardians resigned.

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Mr. *Whiteside*, Q. C., with whom was Sir *Colman O'Loughlen*, now showed cause.

There is a preliminary objection to the form of this conditional order. It is entitled, "The Queen, at the prosecution of the Poor Law Commissioners (who are not a corporation), *v.* The Guardians of the Poor of the Limerick Union." It is not entitled at the prosecution of any one person,—of Mr. Handcock, the Assistant Commissioner, who made the affidavit on which the conditional order was granted, or of any other person.

Independent of this objection, no case has been made to justify the Court in granting this *mandamus*; when there is another mode by which the party could have redress, that mode ought to be pursued: it is only when there is no other legal specific remedy, that the *mandamus* will be granted: *Rex v. Windham* (a); *Rex v. The Bishop of Chester* (b); *Rex v. The Bank of England* (c). No board of guardians now exists, therefore the writ could not be directed to the board as such. It is true that one or two have not resigned, but they are not sufficient to constitute a board, for the 29th section of the Poor Law Act (1 & 2 Vic. c. 56) provides, that to constitute a valid meeting, three members of the board must be

(a) Cowp. 378.

(b) 1 T. R. 396.

(c) 2 Doug. 524.

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present. It is true, a distinction may be taken between the *ex officio* and the elected guardians, but that will not apply to the present case: the 23rd section provides, that certain Justices of the Peace therein named, shall be *ex officio* guardians; but by the 24th section, the number of *ex officio* guardians to sit at the board is not to exceed one-third of the elected guardians; and whenever the number of Justices in the district is greater than one-third, the Justices must hold an election, and elect such a number from their body, as will not amount to more than one-third of the elected guardians, so that in truth the *ex officio* guardians did not take their place at the board as such, but in fact were themselves elected. If then there be no legally existing board of guardians, instead of proceeding against the Justices of the Peace as guardians, the *mandamus* should go against them as Justices, to carry into effect as such the orders of the Commissioners.

Under the 22nd section the Commissioners are empowered to accept the resignation of the guardians. It may be said, as far as the guardians were concerned, it was optional with the Commissioners to accept their resignation, but the word "empower," makes it imperative on the commissioners to accept their resignation; when the authority emanates from a superior, "empower" is imperative: *Dwarris on Stat.*, 775; if so, then from the guardians who did resign, the Commissioners were bound to accept their resignation, and thenceforward there was no legally constituted board of guardians, and the *mandamus* ought not to have been directed to them as if the board existed.

The 26th section provides a remedy for an occurrence of this kind; for it is thereby provided, "That in case regular meetings of the board of guardians of any Union, shall not be holden at the times enjoined by the orders of the Commissioners, or in case, through the default of the guardians, the duties of such board of guardians shall not be duly and effectually discharged, according to the intention of this Act, the Commissioners shall declare such board of guardians to be dissolved, and shall order a fresh election of the guardians of such union; and in case the guardians elected at such election shall not hold regular meetings at the times enjoined by the orders of the Commissioners, or in case through the default of such guardians, the duties of such board of guardians shall not be duly and effectually discharged according to the intention of the Act, then the Commissioners may appoint such and so many paid officers as they may think fit, to carry into execution the provisions of the Act." Now, this section clearly points out a remedy for any inconvenience that may arise by the resignation of the guardians.

But even supposing it optional with the Commissioners, whether they should accept the resignation of the board or not, this is not a case in which the Court will grant a *mandamus*, another mode of obtaining the object in view being specified in the Act.

The *Solicitor-General*, and Mr. *Henn*, Q. C., contra.—The general power of the Commissioners under the Act to make the order is not disputed, and if that power be considered oppressive to the guardians, they should apply to the Legislature to alter it; this Court has no right to interfere with that discretionary power vested in the Commissioners. The sole question the Court has to decide is whether on the law, or the merits, the Commissioners are disentitled to this *mandamus*: *Regina v. The Guardians of the Bramtree Union* (a); *Rex v. The Poor Law Commissioners* (b).—[PERRIN, J. The guardians can be indicted if they refuse to act, and the question is, will the Court grant a *mandamus* where an indictment lies?—We admit, if the Court thought the guardians had a right to do what they have done, they will not compel them to act, or, if a full, effectual and complete remedy was given in another way. In either of those cases an application for a *mandamus* was not the proper course to take.

The 22nd section shows it was never the intention of the Legislature to empower the guardians to give up their functions. If, when they were elected, they refuse to act, a refusal is tantamount to a non-acceptance of the office; but neither an *ex officio*, or an elected guardian, having acted, can, of his own motion, give up the duties of his office; but, if from ill-health, or any other cause, he could not fulfill those duties, his course is to apply to the Commissioners to be relieved from them. The board is an existing board until the Commissioners dissolve it. With regard to the word “empower,” in *Ex parte Robins* (c), Patteson, J., speaking of a section in an Act of Parliament, by which a company were *empowered* to provide engines, &c., says, “By the 174th section, the company are “*empowered*, not required, to provide locomotive engines, or other “power, for drawing things along the railway, and may recover such “sums of money for the use of them as they think proper, in addition to “the other rates authorised to be taken. It seems, therefore, that it was “not intended by the Act to compel the company to take all goods of all “persons which might be offered to be conveyed”—clearly showing that this word is not imperative.

We do not dispute the authority of the cases cited, that if an adequate remedy be provided in any other way, the Court would interfere by the extraordinary mode of granting a *mandamus*; but if the remedy be either doubtful, or if it is not in all respects full and adequate, the Court will grant the *mandamus*: *Rex v. The Company of the Nottingham Water Works* (d). It is no answer to say that an indictment will lie, where it would not be so effectual as a *mandamus*: *Rex v. The Severn Railway*

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Queen's Bench.

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v.
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DIANS OF
THE POOR OF
THE LIME-
RICK UNION.

(a) 1 A. & E., N. S. 142.

(b) 6 A. & E. 54.

(c) 7 D. P. C. 568.

(d) 6 A. & E. 355; S. C. 1 N. & Per. 480.

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Company (a); Rex v. The Commissioners of Dean (b). Now, the election of a new board would not furnish an adequate remedy; it would require a great length of time; there are various preliminaries to be gone through, during which the business of the board would be suspended.—[PERRIN, J. The 25th section enacts that the Commissioners shall order a fresh election, &c. Now, the word *shall* seems to be imperative, especially when it refers to a public duty.]—*Shall*, means at the option of the Commissioners.—[PERRIN, J. *The King v. The Severn Railway Company* does not appear to bear out your argument. There is a case in 4 *Per. & Dav.*, when on the ground that an indictment lay, the Court refused a *mandamus*.]—An indictment might be preferred, but it is not an adequate remedy.

BURTON, J.—The clause in the Act seems to have provided all the necessary remedies; because where the guardians refuse to act, the Commissioners should declare the board dissolved; it seems to aim at providing a perfect remedy. Where a body of men constituted to do a public duty, by executing certain acts, and meeting at certain times, determine to dissolve themselves, and not to do that duty, the best provision that can be made for the case of such a public inconvenience is to have paid officers appointed who will do the duty. Each of those persons may be punished for what he has done; but that cannot be effected by a *mandamus* to compel an unwilling man to do that duty.

CRAMPTON, J.—Suppose we were to grant a *mandamus*, the guardians would make a return to that *mandamus*; the result would be either a law argument at some distant day or a trial. Those proceedings might be put upon the record, and the whole might be carried before the House of Lords. It might be a question of time when the remedy by *mandamus* could be applied, whereas the specific remedy in the Act gives full power to the Commissioners to interfere; some time might be consumed by the process of holding a new election; but not so much as by proceeding by *mandamus*.

PERRIN, J.—I agree in thinking that the guardians had not power to resign; and the Commissioners may accept the resignation or not, as they please.

CRAMPTON, J.—I quite agree with my Brother Perrin. I do not think they had a right to resign of themselves; the law has given the Commissioners a power of accepting or refusing those resignations.

(a) 2 B. & Al. 650.

(b) 2 M. & Sel. 80.

BURTON, J.—I quite concur in that.

Sir *Colman O'Loughlen*, on the same side with Mr. *Whiteside*, was not called on.

BURTON, J.

I believe the opinion of the Court is, that a *mandamus* in this case cannot be properly granted. The clause in question that is relied on is one of so specific a nature, and so applicable to the case, that the Court cannot interfere, the Poor Law Commissioners having a specific remedy provided by the Act for what has been done. The Board of Guardians have acted indiscreetly; they have not considered what the objects of the Act are, and the injurious consequences that might arise to the public in this particular instance. As this case comes before the Court, in my judgment, and acting upon the rules of the Court, it is not a case in which the Court can grant a *mandamus*.

CRAMPTON, J.

I concur in the observations made by my Brother Burton. We cannot interfere, in consequence of the specific remedy pointed out by the 26th section, without breaking in upon the rules upon which the Court acts in cases of this description. The guardians thought they could resign their offices, but that resignation was invalid, and they remain to this moment guardians of the Limerick Union, as if they never went through the form of resigning. It is plain from the Act of Parliament that the Commissioners had jurisdiction to make those orders; and if powers have been given to them by the Act, which the guardians think ought not to be given, they should have applied to Parliament to have the Act amended in that respect.

PERRIN, J.

I think that this conditional order cannot be made absolute. I think that the Legislature has provided a specific remedy, and has distinctly pointed out the course to be taken on the occurrence of such matters as are disclosed by the affidavits. The guardians were very much mistaken in thinking they had a right to cast off the duties imposed upon them by their election to a public office. Every person elected to such an office is bound to fulfil and perform its duties, and the refusal to fulfil a public office is a misdemeanor. It is to be regretted that the guardians should have taken so rash a step; but that does not entitle the Commissioners to a *mandamus*. The statute has provided a proper and complete remedy; and in addition to that, I would feel a great difficulty in making this order, framed as it is, absolute. It is for a *mandamus* to the guardians of the Limerick Union, to obey the orders of the Commis-

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sioners, comprising a great variety of matters not directed to any particular Act; and if we were to make it absolute, and the *mandamus* should go, it would be difficult to say when or how a return would be made to it.

Mr. *Whiteside* applied for costs under 1 *W.* 4, c. 21, s. 6.*

BURTON, J.

The Court is of opinion that no costs should be given.

Cause allowed without costs.

* 1 *W.* 4, c. 21, s. 6, enacts:—"And for making some further provision for the payment of costs on applications for *mandamus*; be it further enacted, that in all cases of application for any writ of *mandamus* whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court; and the Court is hereby authorised to order and direct by whom and to whom the same shall be paid."

Quære.—Does this Act extend to Ireland?

Lessee BYRNE *v.* CAMPBELL.

Nov. 23.

The Court will not allow a conditional order to be amended.

MR. KEOGH moved that a conditional order obtained in this case should be amended in certain particulars.

Mr. *I. Blake* opposed the motion, as being contrary to the practice of the Court.

BURTON, J.*

This seems to be an application without precedent.

No rule.

* *Solus*

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HUNTER, Lessee of HEYWOOD,
v.
REYNOLDS.*

Nov. 15.

ERROR CORAM NOBIS.—In this case an ejectment had been brought for lands in the county of the town of Drogheda; and was tried at the Spring Assizes of 1843 for the county of the town of Drogheda. Defence—not guilty.

A writ of *venire* was awarded for the 2nd of November 1842, at which day the Sheriff of the county of the town of Drogheda made default; and a second award of *venire* issued for the 11th of January 1843, when the Sheriff of the county of the town of Drogheda returned a panel of Jurors to that writ; and thereupon a *distringas* was awarded returnable on the 15th of April 1843, before the Justices of Assize who should come, &c., to wit, on the 21st of February 1843, at Drogheda, in and for the county of the town of Drogheda, at which day the Sheriff returned the writ of *distringas* executed, with a panel of the Jurors, &c.; and the Justices returned the record with a verdict for the plaintiff. Judgment was entered on the 10th of November 1843, and an award of *habere* on the 8th of December 1843; whereupon a writ of error *coram nobis* was brought; and the error assigned was, “That before and
“at the time of the teste of the *venire*, to wit, on the said day of the
“teste of the *venire*, and thence until and at the time of the trial, the
“lands for which the ejectment was brought were situate in the county
“of Louth for the purposes of civil jurisdiction, and not in the county of
“the town of Drogheda; and that a trial took place in the county of the
“town of Drogheda, and not in the county of Louth; and that no writ
“of *venire facias* and *distringas* issued to the county of Louth; nor was
“any leave obtained from the Court to have the issue tried in the county
“of the town of Drogheda, or elsewhere out of the county of Louth;
“nor was there any suggestion entered for that purpose: and that at the
“time of awarding the said writs of *venire* and *distringas* respectively,
“and from thence hitherto, the lands in question were, and yet are,
“for the purposes of civil jurisdiction, part of the county of Louth, and
“not of the county of the town of Drogheda.”

Joinder in error.

Where on a writ of error brought on a judgment in ejectment, which had been commenced in the county of D., the error assigned was, that before and at the time of the teste of the *venire*, and thence until and at the time of the trial, the lands in question were situated in the county of L. and not in the county of D., without stating that at the time of the ejectment brought the premises were in the county of D.; *Held*, that this assignment of error was insufficient.

Quære—Is such a defect cured by the Statute of Jeoffails?

* *Coram* BURTON, J., and CRAMPTON, J.

M. T. 1844. Mr. O'Hagan, with whom was Mr. Napier, Q. C., for the plaintiff
Queen's Bench. in error.

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This case was argued in this Court in Trinity Term last, when we contended that the plaintiff should have been nonsuited (a). The facts are admitted on both sides. The question is not as to the venue, which was right, but as to the *venire*, which should have been directed to the Sheriff of the county where the premises were situated at the time it issued: *Regina v. Mitchell* (b); *Rex v. Justices of Gloucester* (c); *Rex v. Piller* (d). The venue having been changed after issue joined and before the test of the *venire*, the plaintiff in the ejectment should have entered a suggestion of that fact on the record: *Rex v. Harris* (e). The defendant could have done nothing to rectify the error before the Jury was sworn; he could have made no objection, and he could not have challenged the array: 3 *Bla. Com.* c. 23, as there was no partiality or mistake in the Sheriff; the error was on the part of the plaintiff. At the close of the trial we made our objection on the nonsuit point, which was decided against us; we then could not move in arrest of judgment, for there was nothing on the record to enable us; and we thus have been driven to assign error on the judgment that has been entered. This ejectment was tried in the wrong county; and it may be said that the 17 & 18 *Car.* 2, c. 12, cures this, and *Craft v. Boite* (f) may be referred to; but this case is not within the statute. In *Mostyn v. Fabrigas* (g), Lord Mansfield lays it down: "There is a formal and a substantial distinction as to the locality of trials. I state them as different things: the substantial distinction is "where the proceeding is *in rem*, and where the effect of the judgment "cannot be had, if it is laid in a wrong place. That is the case of all "ejectments where possession is to be delivered by the Sheriff of the "county." Our objection here is a substantial one, not a formal one.

Mr. H. Ellis, with whom was Mr. Holmes, contra.—Subsequent to the joinder in issue the Municipal Act came into operation; and unless a new Act, by express words, changes the relation of the parties, the law that was in existence at the time of bringing the action must be the guide: *Hitchcock v. May* (h); *Lord Mayor of London v. Cole* (i); *Craft v. Boite*. The only question before the Court is, was the Judge wrong in refusing to nonsuit?—[CRAMPTON, J. We cannot go out of the record.]—There is no error here; after a trial and verdict the Court

(a) See *Lessee Heywood v. Reynolds*, 6 *Ir. Law Rep.* 1.

(b) 2 *Gal. & Dav.* 274.

(c) 4 *Ad. & El.* 689.

(d) 7 *Car. & P.* 337.

(e) 3 *Bur.* 1333.

(f) 1 *Saund.* 247.

(g) *Cowp. Rep.* 161.

(h) 6 *Ad. & El.* 943.

(i) 7 *Term Rep.* 583.

cannot get rid of the effect of the Statute of Jeoffails. The difficulty is not with respect to the trial; but can we get execution on our judgment? The error is not in the trial, but in the execution on the judgment; and we have now a right to come and get a suggestion entered to have execution. That want of a suggestion is not error. The case here is clearly an unjust one as far as the defendant in the ejectment is concerned, and clearly comes within the words in 17 & 18 *Car.* 2, c. 12; "in any action," may mean and must include ejectment.

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Mr. *Napier*, in reply.—It is said the Corporation Act should not be retrospective with regard to these lands; they have admitted conclusively that these lands were before, and at the time of the trial, a portion of the county of Louth; they have not traversed that, and it is not now open to them. If the judgment be right there must be execution; we can only impeach it on the ground of a mistrial. Would this not be a mistrial at common law? The locality of the premises subsequent to the trial was not in issue, and if by operation of law the lands have been transferred, it is the right of the defendant to have the trial where they are so situated. The defendant could not have entered a suggestion here unless he were taking the trial down by proviso.—[CRAMPTON, J. We have often made orders that the defendant be at liberty to enter suggestions. BURTON, J. Could he not have set the *venire* aside before trial?]
It was not our duty to enter the suggestion, it was the plaintiff's: *Rogers v. Smith (a)*. If the Statute of Jeoffails cure this, then no suggestion need be entered; the venue was right, but the *venire* was wrong.—[CRAMPTON, J. Venue is the place of trial.]—No, but where it is laid in the declaration. This, therefore, being a mistrial at common law, the only way to take advantage of it is by assigning error; for why is the judgment not operative? because there has been a mistrial.

Cur. ad. vult.

BURTON, J. (after stating the facts of the case), proceeded:—

Nov. 25.

It may, I think, well be admitted, that the trial should properly have been had by a Jury of the county of Louth; but this, as it seems to me, was the default as well of the defendant as of the plaintiff in the action, and it is now only to be considered, whether this defect in the proceeding, amounting to an error in fact, is brought before us with sufficient certainty. If it were, the question for the consideration of the Court would be, whether upon that assignment of error, the defect is, or is not cured by the operation of the Statute of

(a) 3 Nev. & Man. 760.

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Jeoffails, according to the construction of these words in the statute, "For that there is no right *venue*, so as the cause were tried by a Jury of the proper county or place where the action is laid." This clause in the statute is, on the part of the plaintiff in error, contended not to be applicable to the case before us, inasmuch as the objection is not to the *venue*, which he is here willing to admit is right and proper, but to the *venire*, which, at the time it was awarded, was, under the circumstances then existing, improperly awarded to the county of the town of Drogheda, when it should have been awarded to the county of Louth. That objection, if the truth of the case were with certainty laid before the Court by the record, would require a very careful consideration. But we think that it is not put upon the record with sufficient certainty. Let me suppose, that previous to the action brought, the lands in the ejectment had been by statute made part of the county of Louth, instead of continuing (as theretofore) part of the county of the town of Drogheda, and that the venue was laid in the county of the town of Drogheda: that defect would, after verdict, as we conceive, clearly have been cured by the operation of the statute, according to the decisions, which, after very great doubt, and much contrariety of opinion, are now held to be decisions binding upon the Courts of Law; and that consequence could not, as we conceive, have been evaded, merely by alleging the default to have been in issuing the *venire* instead of the laying the *venue*.

Here it is contended (and probably very truly) that between the time of bringing the action (laying the venue in the county of the town of Drogheda) and the awarding of the *venire*, the premises for which the action was brought were for the first time made part of the county of Louth. That may certainly be so, but it is not sufficiently, or indeed at all averred; the statement only being, that at and *before* the *teste* of the writ of *venire*, to wit, on the day of the *teste* of that writ, and at the time of awarding the *venire*, the lands were in the county of Louth. Now, this implies at least the possibility of the land being, at the time of laying the venue, in the county of Louth, in which case the fault would be in the venue and not merely in the *venire*. This is an omission or uncertainty in the assignment of error, and could not have been the subject of a traverse of the matter of the assignment; nor can I think that the plaintiff in error has any just cause of complaint, in being thus held to certainty in the matter of his assignment, for he had plainly an opportunity of applying to change the venue before trial, or perhaps of declining to appear at the trial; whereas he has chosen first to take his chance of a trial upon the merits, and has thus put himself in the condition of being obliged to show by a certain averment of error on the record, that the irregularity of the award of *venire* is not cured by the operation of the Statute of Jeoffails.

CRAMPTON, J.

We have nothing before us but the record and the assignment of error. The declaration states the premises to be in the county of the town of Drogheda, and the cause is heard by a Jury of the county of the town of Drogheda. The error alleged is, simply, that before, and at the time of issuing the *venire*, and at the time of the trial, the premises were in the county of Louth, but there is no statement that these premises were, at the time of bringing the ejectment, in the county of the town of Drogheda, or that they were ever in any other county than the county of Louth. Consistently with this assignment, the change of locality may have been before the ejectment was brought, and there is nothing from which the Court is called on to presume that the lands were, at the time of ejectment brought, in any other county than that of Louth. This case then is the same as if the premises were always in Louth, and that is exactly the case of *Craft v. Boits*. The allegation of no suggestion makes no difference. The question, therefore, argued at the bar does not arise; in order to raise that question, the assignment should have stated, that at the time of the ejectment brought, the premises were in the county of the town of Drogheda, and then stated, that by statute they were transferred before the *venire* issued to the county of Louth.

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Judgment for the defendant in error.

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HALIDAY BRUCE, Executor of SAMUEL BRUCE,

v.

JOHN BRABAZON LORD PONSONBY.*

Nov. 5, 8, 25.

By deed reciting that A. B. by his will had devised to C. D. the sum of £10,000 to be paid out of testator's C. estates, which he thereby charged with the payment thereof, and which estates he devised to the defendant, It was witnessed that C. D. had granted to the plaintiff an annuity of £200 to be payable out of the interest of said sum of £10,000; and the deed contained a covenant by the defendant, that he would pay the said annuity during the life of the grantor, and that it should remain a charge on said C. estate; and also a covenant for further assurance by C. D. and the defendant. *Held*, that the covenant to pay this annuity was not contingent upon the solvency of the fund.

Held also, that the defendant was estopped from showing that the said C. estate was discharged from the payment of the annuity.

COVENANT.—The declaration stated, that, by indenture of the 6th of September 1810, made between Frederick Ponsonby of the first part; the defendant, of the second part, and Samuel Bruce, deceased, of the third part (profert); reciting that the late Right Honorable William Brabazon Lord Ponsonby, by his will dated the 23rd of December 1803, had devised unto his son Frederick Ponsonby the sum of £10,000, to be paid him out of his (the testator's) county of Cork estates, which he thereby charged with the payment thereof, with interest, from the day of his decease, and which estate he thereby devised to his eldest son, the defendant; and reciting that Frederick Ponsonby had agreed to grant unto Samuel Bruce (deceased) an annuity of £200 issuing and payable out of the interest of said £10,000, and that the defendant had agreed to pay the same out of the interest of said sum, and to secure the said annuity payable thereout half yearly, and that it should remain a charge upon the said estates in the county of Cork; it was witnessed, that Frederick Ponsonby, for the considerations therein mentioned, gave, granted and confirmed unto Samuel Bruce for the term of one hundred years, if the said Frederick should so long live, an annuity of £200, to be payable out of all that and those the interest of the said sum of £10,000 so bequeathed to Frederick Ponsonby, and charged upon the estates of William Brabazon Lord Ponsonby, to be paid and payable half-yearly by the defendant in pursuance of the covenant thereafter contained (*habendum, &c.*); and it was further witnessed, that the defendant did thereby covenant to and with Samuel Bruce, that he and his heirs and assigns would well and truly pay, or cause to be paid to the said Samuel Bruce, the annuity during the life of the said Frederick Ponsonby on the days and at the place therein named for the payment thereof; the same to be paid out of the interest of the said sum of £10,000 so bequeathed to Frederick Ponsonby, and charged upon the said estates in the county of Cork; and the defendant did thereby further covenant that the said sum of £10,000 should be and remain a charge upon the said estates so devised. And further, that the said sum of £10,000

* *Absent* PENNEFATHER, C. J.

should not be paid off, but that the same, and the interest thereof, should at all times thereafter be subject and liable to, and charged and chargeable with, the said annuity. *Breach*.—That in the lifetime of Samuel Bruce, on the 6th of September 1834, £2600 were due for thirteen years' arrears of the annuity. *Second Breach*.—Arrears due since the death of Samuel Bruce up to September 1842; and the declaration concluded with an averment of notice to the defendant that the same was due, and a request by the plaintiff to defendant to pay the same at the place where made payable.

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The defendant having craved *oyer*, the indenture was set forth as in the declaration; and in addition to the covenants therein stated, there was also one for further assurance by Frederick Ponsonby and the defendant.

The defendant pleaded as to the first and second breaches, *actionem non*, because, that at the time of the testator making his will, and up to his death, and before making the indenture so set forth, the said estates in the county of Cork, so charged with the £10,000, consisted of fourteen townlands (specifying them as in the deed): and that as to seven of these denominations the testator was only seized of an estate for life, and continued so seized of them up to and at the time of his death, and that he had no power to charge the said last mentioned denominations, or any part of them, with the said sum of £10,000 or any part thereof; and that upon his decease his interest in said seven denominations, wholly ceased, and the devise thereof failed; and, that as to the other seven townlands the testator was seized of them in fee; and that at the time of his death he was indebted in considerable sums, by judgments, specialties and simple contract; and that after making the deed of annuity, proceedings were commenced by Frederick Ponsonby in the Court of Chancery against the defendant to raise the said sum of £10,000, and by a decree of the Court in the course of such proceedings, those seven townlands were sold for the payment of the debts of the testator, and of the said £10,000; of all which Samuel Bruce had notice; and that the produce of such sale was duly applied to the payment of those debts, and did not reach the payment of the £10,000 or any part thereof; and that the said last mentioned seven townlands were thenceforth discharged therefrom, and that the £10,000 had wholly failed and had never been raised. *Verification*.

The second and third pleas were substantially to the same effect, with some slight difference in point of form.

Special demurrer to those pleas, and joinder in demurrer.

Mr. Hutton, with whom was Mr. Holmes, in support of the demurrer.—These pleas are bad on general demurrer. Assuming it to be a good defence, that the particular fund on which an annuity is charged, failed,

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it is no defence to this action. The provision limiting the charge to the county of Cork estates gave only a specified lien on the fund to the grantee. As between Frederick Ponsonby and Lord Ponsonby, the deed provides to what account any payment made by Lord Ponsonby should be applied, but it does not affect the rights of the grantee: *Com. Dig. Annuity, A. 2.*—[CRAMPTON, J. If the covenant was, "I will pay the annuity out of the £10,000," do you say that would be binding generally?]
—Yes, it binds him to the solvency of the fund, and the covenantor undertakes to make himself liable generally; for, if a party undertakes to pay out of a particular fund, he cannot allege the insolvency of that fund: *Co. Litt.* 148, *a*; *Ibid.* 146, *a*; *Vin. Abr. Annuity, E. pl.* 18; *Newton v. Weeks (a)*; *Smith v. Boucher (b)*; *Savile v. Blacket (c)*; that being the law in the case of a common grant of an annuity, it is much stronger in the present case, for the grantee relied on the personal responsibility of Frederick Ponsonby and Lord Ponsonby. We can call in aid all the covenants, as the deed is set out on *oyer*. The general rule of law is, that a covenant to pay out of a fund does not cease on failure of the fund, and that principle is here strengthened by the other parts of the deed.

But supposing the defendant could rely on the failure of the fund, he is estopped from averring it in his plea. He does not show how he was entitled to the land after his father's death, he only says that his father had no power to make such a charge, and that is not consistent with the recitals in the deed, for there is an express recital, that his father did devise the land, and if this estoppel apply, it may be taken advantage of on demurrer: *Veale v. Warner (d)*; *Kemp v. Goodall (e)*; *Goodtitle v. Bailey (f)*; *Brighton Railway Company v. Fairclough (g)*; therefore, as to that portion of the plea which treats the late Lord Ponsonby's estate as an estate for life in seven townlands, the defendant is estopped by his deed from so averring: *Bringloe v. Goodson (h)*; and as to the other seven townlands, supposing they could show a failure of the security, the plea is bad. It alleges a seizin in fee, and that certain debts were due, and proceedings taken in the Court of Chancery, and the lands sold for the payment of these debts; but the Court pays no attention to the proceedings in a Court of Equity, the decree does not proceed *in rem*, it merely acts *in personam*, and has no operation on the legal liabilities of the parties. If their case be right, they should apply for an attachment to the Court of Chancery; they aver a sale and discharge, but do not say by what legal means that discharge was effected; they should show the

(a) Aley. 79.

(c) 1 P. Wms. 778.

(e) 1 Salk. 276.

(g) 8 Scott, 540.

(b) Hob. 248.

(d) 1 Saund. 324.

(f) Cowp. 597.

(h) 5 Bing. N. C. 738.

validity of that discharge (a). Further, the plea does not allege that the sale took place before the breach of the covenant, and this being matter of excuse it should be so alleged.

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BRUCE
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Mr. *Macdonogh*, Q. C., with whom were Sir *Thomas Staples*, Q. C., and Mr. *William Miller*, contra.

The pleas are good, but even supposing them bad, the declaration is bad on general demurrer.

Mr. *Holmes*.—They cannot now take an objection to the declaration, as it has not been noted in the Judge's book.

Mr. *Macdonogh*.—It is decided that the grounds of demurrer to a previous pleading need not be noted: *Ryan v. M'Auley* (b).

The COURT concurred.

Mr. *Macdonogh*.—There is no inconsistency whatever between the recitals in the deed and the averments in the plea. The recital is, that the testator charged and devised; the averment is, that he had no power to do so. We admit that he did make such a will, containing such a devise, and affecting to create such a charge, but we avoid the effect given to it in the declaration, by showing the absence of any estate in the testator.

The cases cited do not apply. The cases in 1 *Saund. & 1 Salk.* were cases of tenants not being permitted to dispute their landlord's title; and the cases cited from *Viner* were all cases of either a grant of an annuity, or a covenant to pay it by the grantor, and of course the grantor would, in any event, be bound; but that is the distinction; our case is one not of a grantor, but of a third person, who received ten shillings as a consideration, and who merely covenants to pay out of a certain legacy. The case in 8 *Scott* is a strong authority for us, there was no estoppel there at all. In *Goodtitle v. Bailey*, the recital was, that the testator had not power to make the devise. A general recital is not an estoppel, but a recital of a particular fact is so: *Salter v. Kidley* (c). It is a rule that an estoppel should be certain to every intent, and therefore, if the thing be not precisely and directly alleged, it shall not be an estoppel: *Co. Litt.* 352, b.; *Com. Dig. Estoppel*, E. 4; *Skipworth v. Green* (d) shows the strong leaning of the Courts against estoppels, and it also proves that the intent of the parties is to be considered in the

• (a) 5 Coke, 25, a.
(b) 1 Show. 57.

(b) 1 J. & Sy. 326.
(d) 8 Mod. 311.

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question of estoppel: *Paramours v. During* (a); 10 *Vin. Abr.* 468; *Holloway's case* (b); *Lampon v. Corke* (c); in that case the party was not estopped, as the recital was not of an actual payment, but only of an agreement to pay; and although the deed contained these words: "In consideration of the sum of £40 so paid as hereinbefore is mentioned;" and in p. 611, Holroyd, J., says, "If the deed had absolutely stated a payment, unaccompanied by such words of reference, the case would be very different; but here there are words of reference, and we must, therefore, look to the prior part of the deed; and there we find no statement of actual payment, but only of an agreement to pay. Estoppels are odious in the law, and being so, they ought not to be allowed, unless they are very plainly and clearly made out:" *Right d. Jeffreys v. Bucknell* (d); in that case Lord Tenterden says, "It is a rule that an estoppel should be certain to every intent, and therefore, if the thing be not precisely and directly alleged, or be mere matter of supposal, it shall not be an estoppel, nor shall a man be estopped when the truth appears by the same instrument, or that the grantor has nothing to grant, or only a possibility:" *Bringloe v. Goodson* (e).

There being no estoppel, the main question in the case is one of construction of this deed. Upon the subject of construction, the principle is, that it be favourable, and as near to the minds and apparent interests of the parties as the rules of law will admit: 2 *Black. Com.* 379; *Shep. Touch.* 86; for the maxims of law are, that "*Verba intentioni debent inservire.*" Where this intention is clear, too minute a stress is not to be laid on the strict and precise signification of words, and again, the construction must be made upon the entire deed. This is not a deed poll by Lord Ponsonby speaking his own words only, and therefore to be taken most strongly against him: *Co. Litt.* 134. That rule, being one of some strictness and vigour, is the last to be resorted to, and is never to be relied on but when all the other rules of exposition fail: *Bac. Elem.*, c. 3; but this is an indenture executed by both parties, and therefore to be considered as the minds of them both. A covenant is nothing more than an agreement, in construing which, we have only to look at the fair meaning of the parties to it: *Seddon v. Senate* (f). Now, applying these principles of interpretation to this deed, it is clear that the intention of the parties was not that the defendant should be bound to pay absolutely or at all events, but that the covenants were conditional and dependent upon the continuance of the fund in an available state. The defendant merely covenants to give effect to the annuity

(a) F. Moore, 420.

(c) 5 B. & Al. 607.

(e) 8 Scott, 71.

(b) 1 Mod. 14.

(d) 2 B. & Ad. 278.

(f) 13 East, 77.

out of a supposed existing charge, he does not grant the annuity; and the charge created by the will was an ineffectual charge, the estate having been absorbed by prior charges and incumbrances; and as the defendant had never paid or received, or realised the £10,000, that affords a sufficient defence to this action. If this objection were allowed to prevail, it would give effect to a charge upon land, in respect of which there had been no payment or acknowledgment within twenty years, and thereby defeat the operation of the Statute of Limitations.

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But, supposing those pleas to be bad, the declaration is bad, because there is no personal covenant entered into between Bruce and Lord Ponsonby, but what is referrible to the fund, and the subsistence of this fund was a condition precedent to the payment of the annuity; and there is no averment in the declaration that the interest of the £10,000 was available or raisable for the payment of the annuity: *Com. Dig. tit. Pleader, C. 51*. If the matter to be performed by the defendant depend on some other event, it is proper not merely to assign the breach in the terms of the contract, but first to aver that such event took place before the breaches: 1 *Chit. Pl.* 366, 351; *Buckner v. Rolleston* (a); *Prott v. Smith* (b); *Pitt v. Williams* (c); *Coombe v. Green* (d); and in 2 *Vin. Abr.* 507, C. 14, it is laid down, if a man recites that he has twenty shillings rent issuing out of the manor of D., and grant ten shillings, parcel of the twenty shillings, if he has no rent issuing out of the said manor, he is not chargeable with an annuity, but the grant is utterly void, for he intended to pass the rent he had then; so if the grantor had such a rent issuing out of the said manor, the person of the grantor could never have been charged upon such grant.

Mr. Holmes, in reply.—The defendant was made a party to this deed solely for the covenants in it; and these were, that this annuity should remain a charge on the lands in question. If the charge were merely during the subsistence of the fund, it would be useless making Lord Ponsonby a party to the deed: the reasons for joining him in it were the recitals in that deed, and his express personal covenant. The case on the other side is, that the annuity does not remain a charge, because the estate was sold to pay prior debts; but how can they get rid of the words, "It should remain a charge upon his estate during the life of Frederick Ponsonby?" We admit the distinction between a general and a particular recital: 1 *Roll. Abr.* 873; 10 *Vin. Abr.* 467; *Pl.* 10, 11; *Cro. Eliz.* 362; *Shelly v. Wright* (e); *Lainson v.*

(a) 1 Sid. 304.

(b) 10 M. & W. 453.

(c) 4 Nev. & M. 412.

(d) 11 M. & W. 480.

(e) Willes. Rep. 9.

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Tremere (a); Bowman v. Taylor (b). If any thing was meant by this deed, it was effectually to charge the Cork estates; and there was no use of the recital in it unless to assure Bruce that the man who made the will had the right to make that will and charge the estate.

Cur. ad. vult.

Nov. 25.

BURTON, J., delivered judgment.

In this case the Court concur in the judgment which I am about to deliver. It is an action of covenant—[His Lordship stated the pleadings.]—The covenant in this deed is, that this sum of £10,000 should be charged specifically upon all the fourteen denominations so devised by the will; and that deed contains a covenant for further assurance by Frederick Ponsonby and the defendant. It will be recollected that the defendant was made an executing party to this deed for the purpose of being security for the performance of the covenant, and the grant entered into by Frederick Ponsonby; that is the grant of £10,000.

To the defendant's pleas, the plaintiff has demurred, assigning several (some of them special) causes of demurrer. With respect to the causes of special demurrer, I do not think it necessary to make any observations, conceiving, as I do, that the general demurrer is well supported by the grounds which have been relied upon in argument; particularly that according to the legal construction of the defendant's deed, as set out on *oyer*; his obligation to pay the annuity, by virtue of his covenant, was not contingent upon the solvency of the fund upon which that annuity was made chargeable; and that the defendant having by his deed covenanted that the sum of £10,000 should, during the life of Frederick Ponsonby, always be and remain a charge upon all his (the defendant's) county of Cork estates therein mentioned; and that the said sum, and the interest thereof, should continue charged with the payment of the said annuity; he (the defendant) is precluded from showing that the said estates, or any of them, were discharged from the payment of that sum (the £10,000) or of the said annuity.

It has been in the course of the argument very distinctly and fairly admitted on the part of the defendant, and as being well established by the authorities cited, that notwithstanding the annuity granted by Frederick Ponsonby was, by the terms of that grant, made payable out of the interest of the £10,000, he was, under his grant of that annuity, personally liable to the payment of it; whether the land on which that sum of £10,000 was charged, continued liable to that charge or not. Now, it seems to me that the defendant has, by the express terms of the deed executed by him to Samuel Bruce (the deceased), placed himself, at least

(a) 3 Nev. & M. 603.

(b) 3 Nev. & M. 603.

very nearly, if not altogether in the same condition ; for although he may not, by the terms of the deed, have joined in the grant of the annuity, so as to make himself a joint grantor of that annuity, he has yet expressly covenanted, granted and agreed with Bruce, that he the defendant, his heirs and assigns, would well and truly pay, or cause to be paid to the said Samuel Bruce, his executors, &c., the said annuity of £200 ; adding to the terms of that covenant and grant (as was added to the grant of Frederick Ponsonby), that the same was to be paid out of the interest of the £10,000 ; but, taking this as a covenant for the payment of this annuity out of lands (thereby making the lands the provision for the payment of it), yet this, and still more strongly (if possible than this), other parts of the deed amount to a clear and absolute covenant for the title to those lands : for having stated that the £10,000 were charged upon the estate in the county of Cork, as thereafter particularly mentioned, he thereby expressly covenants, grants and agrees with the said Samuel Bruce that the said sum of £10,000, so bequeathed to the said Frederick Ponsonby, and charged upon the said estate in the county of Cork, as thereafter particularly mentioned, should be and remain a charge upon the said estate in the county of Cork, so as aforesaid devised to him (the defendant) by the said William Lord Ponsonby ; that is to say, &c., specifying *seriatim* the fourteen denominations, including (*nominatim*) the seven denominations which his pleas now represent as not passing by the will of William Lord Ponsonby ; and then in the covenant for further assurance, he expressly describes those lands and premises so enumerated as being the estate of him (the defendant.)

This is, as it appears to me, a clear and conclusive admission and averment of title which he is now estopped by his deed from controverting ; and consequently the general demurrer to the pleas must be allowed, and judgment entered for the plaintiff.*

CRAMPTON, J.

I quite concur in the conclusion at which my Brother Burton has arrived, that the demurrer must be allowed. The pleas furnish no answer

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* Executors of KENNEDY v. STEWART.†

1836.
Jan. 30.

CRAMPTON, J.—This is a demurrer to the defendant's pleas. The action is covenant upon a deed of rent-charge, dated the 1st of January 1814, and made between the defendant and Kennedy, the testator of the plaintiffs. By this deed the defendant granted a rent-charge or annuity of £—— yearly for sixty-two years to Kennedy, and covenanted with the grantee, his executors, administrators and assigns, for the payment of the rent-

Covenant to pay a rent charge does not run with the rent to the assignee of the rent-charge.

† The Reporters have been furnished with this judgment, delivered by Mr. Justice CRAMPTON, and it is inserted as a note to the above case, as involving a question of importance.

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to the declaration, and the defendant is estopped from denying that he took nothing under the will ; but I express no opinion as to whether the covenant is an absolute one to all intents and purposes, or one depending on the fund thereby charged, during the continuance of the life of the annuitant.

Judgment for the plaintiff.

1845.
Hilary Term.

Jan. 30.

In an action of covenant on an annuity deed by the executor of the grantee, who had obtained judgment on demurrer, the ordinary rule for liberty to tot is the proper one.

PENNEFA-
THRE, C. J.,
dissentiente.

On the 30th of January 1845, in the absence of BURTON, J., in this case—

Mr. *Hutton*, with whom was Mr. *Holmes*, applied for liberty to tot on the usual affidavit.—We obtained judgment on demurrer, and no issue in fact being knit on the record, we are now entitled to final judgment. It is not necessary to have a writ of inquiry to compute the arrears of the annuity ; that can be done by the officer without the intervention of a Jury : 2 *Chit. Arch. Prac.* 709 ; *Barry v. Rainsford (a)*. The same

(a) *Arnold*, 93 ; see also *Alluoway v. Hill*, 2 *Chitty R.* 32.

charge. The plaintiffs are the executors of Kennedy, who is deceased, and they declare for arrears of the rent-charge or annuity (for it is denominated both ways all through the pleadings), accrued due since their testator's death.

The declaration contains three counts, and there are two pleas to each of these counts ; but it will be only necessary to consider the first count and the first plea, as the reasoning upon those will apply to all. The first plea states, by way of inducement, that by deed of the 9th of October 1826, Kennedy the grantee had, in his lifetime, assigned the rent-charge or annuity to the defendant and to one Arthur, who were then possessed and entitled thereto ; and the plea concludes with a special traverse of the plaintiff's title to the rent-charge or to the arrears.

To this plea the plaintiff has demurred ; and he has assigned specially several causes of demurrer. But it will not be necessary to notice these special causes, as the Court is of opinion that the plea is substantially bad. The short ground of this opinion is, that the plea does not appear to us to furnish an answer to the plaintiff's declaration. If the effect of the deed relied upon by the defendant was to extinguish the rent-charge altogether, as was suggested during the argument, this action would not be maintainable ; but the operation of that deed (of 9th of October 1826) was clearly to extinguish the rent-charge for one moiety only ; *i. e.*, so far as the rent-charge was assigned to the grantor of it, *i. e.*, the defendant himself. In *Co. Litt.* 149, *b*, it is thus laid down : " And so it is, if the grantee grant the rent to the tenant of the land, and to a stranger,

practice is followed in cases of non-payment of rent: *Wingfield v. Cleverley* (a); *Byrom v. Johnson* (b). Under the Act of 7 & 8 Vic. c. 107, the Master has power to examine by affidavit; and independently of that, witnesses may be examined, *vivâ voce*, under 3 & 4 Vic. c. 105, s. 69.

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Mr. *Macdonogh*, and Mr. *William Miller*, contra.—The cases cited are between the grantor and grantee of an annuity: *Denison v. Mair* (c). The power given to the officer by the Act referred to is one in reference to affidavits in a cause in Court. Where there is the slightest uncertainty in the amount, or a necessity for entering into collateral matters, a writ of inquiry must be adopted. Even in bills of exchange no right can be taken from the parties to go before a Jury: 1 *Tidd Prac.* 571, last ed.: *Maunsell v. Lord Massarene* (d); *Nelson v. Sheridan* (e). *Ferguson's Prac.* 1103.

CRAMPTON, J.—The position laid down in *Ferguson* is too wide.

PERRIN, J.—It is every day's practice in an action of covenant on a lease to have the ordinary rule to tot.

Mr. *Holmes*.—This is no collateral matter at all, nor is there any

(a) 13 Price, 53.

(b) 8 Term Rep. 410.

(c) 14 East, 622.

(d) 5 Term Rep. 87.

(e) 8 Term Rep. 395.

the rent is extinct but for a moiety." Had the assignment been made to the defendant alone, that assignment would have altogether extinguished the rent-charge and the covenant to pay it; but it is made to the defendant and to *Arthur*, and therefore, the rent-charge as to a moiety is still in existence, and the covenant is still in existence to enforce it. But though the rent-charge and the covenant are still in force, to maintain the action the covenant must have remained with Kennedy after he had assigned the rent-charge, in order that his executors may avail themselves of it.

The great question in the case then is, whether the covenant has passed with the rent-charge to the assignee, or whether it remained in Kennedy after the assignment. If it so remained, it is now in the executors of Kennedy, and the plea is no answer to their action; but if the covenant passed to the assignee of the rent, then, however inaccurately the plea may be framed, it would disclose a substantial bar to the plaintiff's action.

Now, on this question the case of *Milnes v. Branch* (5 M. & Sel. 411) is an express authority. The principle is explicitly laid down by Lord Ellenborough in his judgment; and though Bayly, J., puts the case on a new ground, he declares his entire concurrence with Lord Ellenborough.

A dictum ascribed to Lord Holt, in the case of *Brewster v. Kidgill* (12 Mod. 170),

H. T. 1845. uncertainty, it is a mere question of figures. This is almost the same as
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PENNEFATHER, C. J.

In my opinion, this rule to tot ought not to be granted; but my Brethren do not concur in that opinion. There is no doubt but it is an innovation of the rule of ascertaining the demand of one person against another. That was generally done through a Jury, but this has been a modern improvement, the referring it to the officer, and is a cheap and expeditious mode; but while I agree that the proceeding by totting should be approved of, I cannot but think that there are cases where the party may be restrained from resorting to that practice, if the Court can be convinced that the case is one out of the ordinary rule, or one of greater difficulty than usual; and it appears to me this case comes within that principle: first, the party sued is not the original defendant; and secondly, the person who sues was not the original person entitled to the annuity. I do not mean to say that that alone should be sufficient

was relied on by the plaintiff's Counsel in *Milnes v. Branch*, and has been relied upon by the defendant's Counsel upon the argument of this case; it is this:—"I make no doubt, but that the assignee of the rent shall have covenant against the grantor, *because it is a covenant annexed to the thing granted.*" But, as was said by Lord Ellenborough, in *Milnes v. Branch*, this dictum was extrajudicial, and not warranted by any authority.

It appears by the case itself, as reported, that Lord Holt was not supported by the opinion of any of his Brethren. And I may add, that the case of *Brewster v. Kidgill* (the case relied on) is reported in four different books (1 Ld. Raym. 317; 1 Salk. 198; 5 Mod. Rep. 369; and 12 Mod. 170); in three of these reports the dictum relied upon is not found; it appears only in 12 Mod., a book of no great authority. We must, therefore, take the law to be, that the covenant to pay the rent-charge does not run with the rent to the assignee of the rent-charge; and this rules the demurrer in favour of the plaintiff.

But Mr. Napier contends that conceding the principle just stated as to a rent-charge, yet that it does not apply to the assignment of a personal annuity, in which case, he contends that the covenant may well run with the annuity "as being annexed thereto." And to support this doctrine he has again recourse to Lord Holt's dictum in *Brewster v. Kidgill*.

Now, to this there are several answers. First,—The dictum has been already observed upon as being of no authority. Secondly,—If it were of authority it is applied by Lord Holt, not to the case of a personal annuity, but to the case of a rent-charge. Thirdly,—The parties in this case, both plaintiff and defendant, have treated the subject of this action as a rent-charge; the plaintiff calls it in his declaration "a rent-charge, annuity or yearly sum," but alleges that it is by the deed creating it charged on specified lands. The defendant entitles it exactly as the plaintiff does. We cannot, therefore, take it as a mere personal annuity. Fourthly,—But even were it so taken, the defendant's Counsel have failed in showing us any warrant in law for the assertion, that a covenant to pay a personal annuity runs with the annuity to the assignee of the grantee. That such an annuity is assignable we do not question.

to take the case out of the ordinary rule; but there are other difficulties involved in it, so that it is not one of those transactions which, from its simplicity, could be as well disposed of by the officer as by a Jury. In every case of intricacy of account, I can understand the reason for preferring a Jury; accounts may become perplexed, difficulties may arise, and after a lapse of twenty years, the same matter may appear to different persons in different circumstances; for these reasons, as a general rule, they must not be taken from the Jury. In the case of parties claiming under mortgages, it is not usual to leave that class of cases to the officer, because the parties may change, and a great deal of investigation may be requisite.

Upon these grounds, I am of opinion that this rule ought not to be granted.

CRAMPTON, J.

Were it not for the expression of opinion of my Lord Chief Justice, I should feel no difficulty upon this point. This application appears to me similar in its facts to the rule upon bills of exchange. This is a case of

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That an action of debt is maintainable by the assignee of the annuity is also admitted; but that he can maintain covenant, there is neither authority nor precedent for saying. Between the two forms of action there is much difference, they are by no means co-extensive. Debt is founded upon privity of estate, upon statutes, and upon duties as well as upon contracts. Covenant is founded upon privity of contract; and can it be said, there is any privity of contract between the grantor of a personal annuity and the assignee of his grantee? It does not vary the case to say that the covenant is annexed to the thing granted. So it is in a rent-charge as well as in an annuity, as long as the privity of contract and the privity of estate are united. Covenant (for other reasons) runs along with the land, but it is quite new to extend the principle to rent-charges and annuities. It is argued again, that covenant will run with tithes to an assignee of the reversion, and it is asked, why should not the same principle apply to rent-charges? It has, undoubtedly, been so decided as to tithes, in the case of *Bally v. Wells* (3 Wils. 30), but the analogy fails; the grounds assigned by the Court for the determination in *Bally v. Wells* do not apply to the case of rent-charges. They see no difference between land and tithes; "tithes is a tenth part (say the Court) of the profits of the land, and is land itself;" and I may add, rent may be reserved by lease for tithes as for land, and to reserve rent for a rent-charge would be absurd. Secondly. The case of an assignee suing the grantor is very different from that of the owner of the estate leased suing the assignee of a lessee upon a covenant by lessee for him and his assigns (3 Wils. 25); *Spencer's case* (5 Rep. 16, a.)

Again, it is argued, if debt is maintainable by the assignee, and covenant is maintainable by the grantee, then there are two actions at the same time for the same demand against the same defendant by two different persons. The cases of *Noke v. Auder* (Cro. Eliz. 436) and *Webb v. Russell* (3 T. Rep. 393), furnish the answer. Where the thing granted is in A., and the right to sue upon the covenant is in B., the law allows a proceeding by either A. or B., though not specially for the same thing; and it is not to be complained of, for by paying the demand to either A. or B., the defendant is secure.

It follows that the demurrer must be allowed.

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an action of covenant on an annuity by the grantee against grantor, and there has been a judgment by default; and the question is, whether the party is to go to the expense of a writ of inquiry, or go before the officer to ascertain the sum due? Now, I cannot conceive how any complexity can arise in this case more than in any other. The practice, I apprehend, both in Ireland and England, is precisely the same. It is said, that the case of *Dentson v. Muir* bears upon this point. That appears an excellent illustration of the limit of the rule: it was a case upon an indemnity deed for unliquidated damages, and not a case to which the rule would apply. Now, what is the principle by which we are to be guided? Where the computation is a mere matter of figures, whether the action be assumpsit or covenant, it is the general rule that totting is the proper course. That is conceded to be the general rule, but it is said, that where credits are to be claimed, that rule does not apply. It is very easy for the officer to strike a balance between the parties. The practice used to be so in *elegits*, where great credits were allowed, and the events of years gone over, and yet the officer took the accounts. This is a case purely of figures.

It is said, however, that the practice is the other way; no such thing. What is the difference between an annuity and a claim for rent? and it is the settled practice to send cases of rent before the officer. There is no difference whatever; there is, therefore, neither principle nor practice in favour of this motion. But then it is said, that a Jury is the more proper tribunal; that may be so; but the Master is more competent to make the inquiry in mere matters of figures, however competent the Jury may be in matters of account. Further, it is said there is a difficulty in examining witnesses; this is generally done by affidavit, it is a matter very simply done; and if there were a difficulty as to that, it is open to the Court to make an order for the witnesses' examination *viva voce* if desired. I therefore do not think that we are innovating any principle or practice. I think we are carrying out the common rule of the Court, which applies as much to an annuity deed as to the case of a lease or a bill of exchange. Part payments might be made on a bill of exchange by the acceptor and others, and all may be settled by the officer. It is nothing but a money matter.

For these reasons, my opinion is, that we ought to grant the rule, and if the parties desire it, to give the officer a power to examine witnesses.

PERRIN, J.

I think that this is the ordinary rule according to the settled practice of the Court. Where it is decided upon demurrer that a party is liable in an action of this description, the practice is to take an account between the parties, before the officer. It strikes me, that a matter of account is

much better settled by the officer than by a Jury, where each particular item may be canvassed; whereas, before a Jury you do not know which item is rejected and which admitted; besides, it saves expense, and no difficulties are suggested on the affidavit of the attorney. It is said that there is no mode of compelling the attendance of witnesses, but there is no such difficulty, for the Court would have power to make an order for their attendance. I, therefore, see no reason for refusing this rule unless we alter the practice of the Court.

Usual order made.

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CONDON v. CONDON.

1844.
Michaelmas
Term.
Nov. 25.

MR. O'DELL moved on behalf of the defendant, that the notice of trial and all proceedings subsequent thereto should be set aside, and that accordingly the cause be struck out of the list of records for the approaching after Sittings, and for the costs of the motion.

The 29th Rule of this Court, requiring a Term's notice before going to trial when the cause is three Terms at issue, is not now acted on.

Issue had been joined in Michaelmas Term 1843, since which time no further proceedings had been taken until the present Term, when the plaintiff served the ordinary notice of trial; whereupon the defendant cautioned him by notice against proceeding to trial, he not having given a Term's notice, pursuant to the 29th Rule of this Court, which says, "That after any cause is at issue three Terms, the plaintiff must give the defendant or his attorney a full Term's notice before he shall go to trial in the said cause:" *Moore and Lowry's Rules*, 22; where it is said this rule is constantly acted on: 1 *Ferg. Pr.* 287.

Mr. Robert Ferguson, contra.—This rule is quite obsolete and never acted on (a); the practice now is the same in all the Courts.

CRAMPTON, J.

This rule is a very old one, and the officer has informed me that it has not been acted on for a great number of years, and that the practice that prevails is similar to that in other Courts, namely, that not until after the lapse of a year and a day this notice is necessary.

No rule.

(a) Batty, 578.

E. T. 1845.
Common Pleas.

MONTGOMERY *v.* BLACKWOOD and another.

April 23.

(Common Pleas.)

The Court will not allow execution to issue, without suggestion of breaches, on a bond conditioned to pay over to the treasurer of a county the county cess to be levied by the high constable off a barony, before the next Assizes.

MR. T. KENNEDY LOWRY, on behalf of the plaintiff, moved that he might be at liberty to issue execution upon the judgment in this cause, without suggesting breaches of the condition of the bond on which it was entered.

The bond was executed to the plaintiff as treasurer of the county of Down, for the sum of £3000, and contained a release of all errors, with a condition in the following words:—"Now, the condition of the foregoing obligation is such, that if the above bounden George Blackwood, one of the high constables of the barony of ———, do and shall well and faithfully levy and collect the county cess laid on the said barony by the Grand Jury of the said county at this Assizes, or such part thereof as is due on, and ought to be levied off the said barony, and the same so levied do pay and hand over unto the said Arthur Hill Montgomery, Esq., or his successors, three days before next Assizes; then this obligation to be void and of no effect, or else to be and remain in full force and virtue in law." The affidavit of the plaintiff stated that he still continued treasurer of the county; that the defendant Blackwood did not pay and hand over to him three days before the said Assizes, or at any time since, the entire of the county cess laid on the said barony by the said Grand Jury of said Assizes, which was, or ought to have been, collected by him off the said barony, pursuant to the condition contained in said bond; but, on the contrary, that he was still in arrear and indebted to him, as treasurer of said county, on foot of said county cess, the sum of £236. 15s. 8d.; and that the sum was still justly due and owing on foot of said bond and judgment, over and above all just and fair allowances, besides the costs of entering judgment on said bond. Counsel relied on the practice of this Court as stated in 1 *Ferg. Prac.* 447; and the cases of *Ross v. Halpin* (a); *Woffington v. Armstrong* (b); *Purcell v. O'Reilly* (c)—as entitling the plaintiff to issue execution without the delay and expense of suggesting breaches.

Per Curiam.

We have never gone further than allowing execution to issue on an

(a) 1 Law Rec. N. S. 205.

(b) Glasc. 209.

(c) 3 Law Rec. N. S. 25.

annuity bond, without suggesting breaches ; and as we consider this case to be clearly within the statute, the plaintiff must suggest breaches.

No rule.

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MERY
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Lessee WILSON v. HENDREN.

April 24, 25.

THIS was an action of ejectment on the title, which was tried before Crampton, J., at the last Carrickfergus Assizes. Counsel for the plaintiff produced, and relied upon, a lease of the premises mentioned in the declaration in ejectment, bearing date on the 27th of February 1769, and purporting to have been made by one Ezekiel Davys Wilson to one James Addison, for and during the term of sixty-six years, commencing on the 1st of November 1768, which it was alleged had expired on the 1st of November 1834. The plaintiff proved that the interest of the grantor of that lease was vested in his lessor ; but on production of the lease, it appeared that the demise was of the premises mentioned in the ejectment at a pepper-corn rent, "For and during the term of sixty-six years, provided the said Ezekiel Davys Wilson's (a) lasted so long, to commence on the 1st of November last." It appeared in evidence, that the said Ezekiel Davys Wilson died in 1821 ; that the defendant, Hendren, had got into possession in 1838 ; and that between 1835 and 1838, he had said to the agent of the lessor of the plaintiff, "That the lease of the garden was out, or would soon be out, and that he should have to pay rent for it ;" and on which occasion, some verbal negotiation for a new lease had taken place between the defendant and the lessor of the plaintiff. Counsel for the defendant contended, that inasmuch as it did not appear that Ezekiel Davys Wilson had any interest in the premises which would extend beyond his life, and as it was not shown that there was any receipt of rent for these premises by any of the lessors of the plaintiff, or any person under whom they, or any of them, derived, within twenty years before the day of the demise ; nor that any acknowledgment in writing had been given by the defendant,

In an ejectment on the title, the plaintiff produced and proved a lease of the premises bearing date in 1769, purporting to have been made by one E. D. W. to J. A., "for and during the term of sixty-six years, provided the said E. D. W.'s lasted so long ;" but gave no evidence of the existence of the interest of E. D. W. in the premises. There was some evidence of a verbal negotiation between the defendant and plaintiff for a new lease between 1835 and 1838, in which latter year the defendant got into possession. *Held*, that notwithstanding proof

of the death of the said E. D. W. in 1821, the Jury were properly directed to find a verdict for the plaintiff ; and that as the lease must be taken to have expired in 1834, there was no ground for the operation of the Statute of Limitations.

(a) *Sic* in orig.

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or any person under whom he derived, the plaintiff had not made out a title, and ought to be nonsuited. The learned Judge refused to nonsuit, and directed a verdict for the plaintiff, reserving liberty for the defendant to move the Court to have a nonsuit entered, should they be of opinion that the plaintiff ought to have been nonsuited. The Counsel for the defendant having obtained a conditional order on the foregoing terms—

Mr. *Napier*, Q. C., for the defendant, moved the Court to make the conditional order absolute, and that the verdict should be set aside and a nonsuit entered.

The omitted word in the sentence of the lease in question, "Provided the said Ezekiel Davys Wilson's lasted' so long," is either "life" or "interest." If the former, which in the absence of proof is to be presumed, the lease expired on the death of Wilson in 1821, and there having been no payment of rent or acknowledgment of title since, the plaintiff is bound by the Statute of Limitations: *Doe d. Mannion v. Bingham* (a). If the word "interest" is to be supplied, the *onus probandi* of the continued existence of that interest lay upon the plaintiff; and having omitted to give any evidence on the subject, he ought to have been nonsuited: *Clear's case* (b). The mere verbal negotiation for the renewal of the lease is no answer; for it has been decided that even a written negotiation to hold the lands in dispute at a moderate rent, is not sufficient to take the case out of the statute: *Doe d. Curzon v. Edwards* (c).

Mr. *Gilmore*, Q. C., and Mr. *Henry Joy*, for the plaintiff.—The verdict should stand; for if the lease was for sixty-six years, to be computed from 1768, it expired in 1834; and then the statute is no bar, as the case of *Doe d. Mannion v. Bingham* only decided that an ejectment for non-payment of rent was not maintainable during the continuance of the lease, and did not decide that an ejectment was not maintainable at the expiration of it. At all events, it has been ruled in the cases of *Grant v. Ellis* (d); *Doe d. Davy v. Oxenham* (e); and *Daly v. Lord Bloomfield* (f)—that the statute does not apply to cases of rent reserved by lease. On the other hand, a tenant is not admitted to contradict the title of his landlord, unless that title has expired before the ejectment was brought; and in that event, the fact is to be established by the tenant affirmatively: *Doe d. Syburn v. Slade* (g); and the tenant has not

(a) 3 Ir. Law Rep. 456.

(c) 6 M. & W. 295.

(e) 7 M. & W. 134.

(b) 1 J. & S. 93.

(d) 9 M. & W. 113.

(f) 5 Ir. Law Rep. 65.

(g) 4 T. R. 682.

shown that here. It is not incumbent on the lessor of the plaintiff to show at what time his interest expired: *Clear's case* is inapplicable, as it was not between landlord and tenant, and is wholly inapplicable to that state of circumstances. The lease, therefore, must be taken to have expired in 1834, and then the statute is out of the question.

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Mr. O'Hagan, in reply.—The case of *Deo d. Syburn v. Slade*, does not determine the question raised here; because the interest which existed in that case was absolute, and not determinable, as in this case, on a contingency.—[BALL, J. But if the contingency is expressed in vague and uncertain words, so that we cannot define it, is not the term absolute for sixty-six years?—It is quite clear that the lease is determinable on something, which the Court is bound to supply: *Doe d. Davy v. Oxenham* was decided before the case of *Mannion v. Bingham*, and was cited in it; and therefore, cannot be considered by this Court as being inconsistent with it.

DOHERTY, C. J.

This case of Lessee Wilson against Hendren was an ejectment on the title, which was tried before Judge Crampton at the last Carrickfergus Assizes; and it came before this Court on an application by the defendant that the verdict had for the plaintiff should be set aside, and a nonsuit entered, pursuant to liberty reserved by the learned Judge at the trial to that effect.

April 25.

It appears that the land in question was a garden situated in the town of Carrickfergus, held for a term of sixty-six years, commencing in the year 1768. It is unnecessary to detail the evidence, as the question principally depends upon the wording of the lease produced and proved on the part of the plaintiff. Had this lease been a simple demise for sixty-six years, without any additional words, no question could be raised to disturb the verdict, as the plaintiff would be clearly entitled to maintain his ejectment; but, on the production and reading of the lease, it appeared to be a demise "for and during the term of sixty-six years, provided the said Ezekiel Davys Wilson's lasted so long;" and it is the insertion of this latter clause, or the omission of some other word or words in it, which gives rise to the question raised, and which is as follows:—It is contended, that the term for sixty-six years when taken in connection with the proviso, might, in point of fact, turn out to have been a term for less than sixty-six years, as depending upon an existing contingency, which is not, however, clearly defined, but which it is suggested the Court ought to define, by supplying a word to fill up an omission in the language of the lease; and that then the lease would have expired more than twenty years before the day of the demise, and so bar the plaintiff by the Statute of Limitations. Now, my own indi-

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vidual opinion is, that we have no power to fill up the omission in the lease ; and that without something being supplied, the proviso in question is insensible and without meaning, and ought to be struck out, which would leave the demise for sixty-six years absolute, and without restriction ; and therefore, leave no foundation for the defence grounded on the Statute of Limitations.

But that is not the ground on which this case is to be decided. There is another. The Counsel for the defendant urged that it did not appear that Ezekiel Wilson had been possessed of any interest beyond his own life, which expired in 1821 ; and that as it had not been shown that there had been any payment of rent, or acknowledgment in writing, by the defendant, or any other person in possession of the premises, within twenty years, the plaintiff had not made out any title, and ought, therefore, to have been nonsuited. But the verdict ought, in my opinion, to remain undisturbed, inasmuch as there appears to have been abundant evidence for the Jury to conclude, that the interest of the lessee, whatever it might have been, continued beyond the life of Ezekiel Wilson. The interest of the defendant did not commence until 1838, and there is evidence to go to the Jury, that between 1835 and 1838, the defendant had held conversations, from which the Jury were warranted in inferring that the interest of the lessor of the plaintiff was a continuing interest at that time ; and as those who have sought ground for bringing the Statute of Limitations into operation, admit that if the interest continued beyond the life of Ezekiel Wilson, which expired in 1821, there was no foundation for raising the point, I am of opinion that all questions are closed by the finding of the Jury.

TORRENS, J.

I concur with the judgment of my Lord Chief Justice on both points ; and I also concur in the law as laid down by Mr. *Gilmore*, that the onus of proving that the interest for sixty-six years had expired before the year 1834, by reason of some contingency having happened in the mean time, lay upon the defendant ; which, in my opinion decides the question.

BALL, J.

I concur in the judgment of the Court. It appears to me that the common principles applicable to the construction of ambiguous instruments, in general, rule this case in favour of the plaintiff, as regards the first point, to which my Lord Chief Justice has adverted. The first of them is, that the language of the instrument is to be construed most strongly against the grantor ; and secondly, if a tenant takes an equivocally worded lease, he is to have the benefit of the doubt. Now, to apply these to the present case : this lease is uncertain in its terms as to the proviso, condition, or contingency, which is intended to cut down the

otherwise absolute term. The ground of the defendant's argument is, that this blank is to be filled up in one of two ways—either with the word “life,” or the word “term;” but this is to be done by conjecture. Now, according to the settled rule, that the instrument, in cases of conjecture, is to be construed most strongly against the grantor, we must take it that the contingency which is to cut down the term of sixty-six years, not being clearly announced, that the term is to be taken as absolute. Again, apply the rule, that in doubtful cases the tenant is to have the benefit of the ambiguity, or, as in the case of a lease for seven, fourteen, or twenty-one years, the tenant is to have the option of the term for which he is to hold; so here, he has got either a term for sixty-six years, absolute, or a contingent term, which is not clearly expressed; and therefore, on the principles to which I have alluded, he is to be taken to have had the benefit of the absolute term, and not to have had it cut down by conjecture. On these grounds, I am of opinion, that the question which has been argued, on the effect of the Statute of Limitations, does not arise; and that, therefore, the verdict must be allowed to stand.

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I concur in the judgment of the Court, that the verdict should not be disturbed; and I should not think it necessary to offer any observations on the subject, were it not that I do not quite agree in the position, that the condition or proviso is to be considered as unmeaning or insensible; for it appears to me, that the construction is plain and intelligible. I think it ought to be read thus: “*Habendum* during a term of sixty-six years, provided Ezekiel Wilson’s (term) last so long.” The word “term,” is clearly to be supplied, according to the grammatical construction of the sentence. On the other hand, I do not think that the insertion of that word assists the defendant in his argument; for even if it had been inserted, yet the term of sixty-six years was good, until the event expressed in the proviso had arisen; and according to the Judge’s report, there was no evidence that such an event had occurred; and as it did not appear, it must be taken not to have existed. The lease, therefore, continued in existence until 1834, and there was no ground for raising any question as to the operation of the Statute of Limitations. The Jury, therefore, found a proper verdict for the plaintiff, and it ought not to be disturbed.

Allow the cause shown with costs.

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O'NEILL v. READ.

April 28.

Admissions, and letters written by an infant, are receivable in evidence on the part of the plaintiff, in an action brought against him (the infant) after attaining his full age, for necessities furnished to him during infancy.

THIS was an action of *assumpsit*, brought to recover the price of a horse sold and delivered by the plaintiff to the defendant, and was tried at the last Assizes for the county of Cork before Mr. Justice Ball. The plaintiff claimed by his bill of particulars £100 for the price of the said horse. The defendant pleaded infancy; and the plaintiff replied that the said horse was a necessary suitable to the degree, estate, and condition of the defendant; upon which issue was joined.

The plaintiff, at the trial, produced and examined a witness, who deposed that he had an interview with the defendant in July 1840, at which time it appeared that the defendant was under age, and had a conversation with him, when he (the defendant) told him that he wished to buy a horse from the plaintiff, and offered to secure him by giving a bond and insurance, and requested the witness (who was the plaintiff's attorney) not to throw obstacles in the way, as his health was delicate, and he required horse exercise; and that his allowance as a minor was £300 per annum; and that he would, on attaining his majority, have £1000 per annum, which would be increased to £1800 per annum on the death of his grandmother. Counsel for the defendant objected to the reception in evidence of these declarations, on the grounds—first, that the admissions of an infant were not evidence, in an action of *assumpsit*, against him; and secondly, that his admissions could not be evidence for the purpose of showing that the horse was a necessary, and suitable to his estate and condition. His Lordship overruled both objections, and also similar objections to the reception of some letters written by the defendant while under age—but reserved the point; and the Jury found a verdict for the plaintiff for £100, as being the price of the horse. The defendant's Counsel obtained a conditional order that the verdict should be set aside, and a nonsuit entered; or that a new trial should be directed, on the ground of the reception of illegal evidence.

Mr. Henn, Q. C., and Mr. Pigot, Q. C., showed cause against this conditional order.—The only question for the consideration of the Court is, whether an admission by an infant is receivable in evidence, in an action brought against him after he attains his full age; and it will be argued on the other side on the analogy of an infant's answer not being allowed to be read against him; but such evidence is rejected, on the ground of the answer being the answer of his guardian, and not of the

infant: *Chambers on Infancy*, 787; *Eccleston v. Petty* (a). The principle, therefore, on which such evidence is rejected, is in our favour; and as it is well settled that the testimony of an infant is receivable against others (if he is capable of knowing the nature of an oath), why should it not be received as against himself? "Confessions of persons in criminal cases are received in evidence, upon the same principle on which admissions in Civil Courts are received:" 1 *Phil. on Evid.* 419; and therefore, confessions of infants being receivable in criminal cases to convict them, their admissions in civil cases are equally receivable: *King v. Thornton* (b); *Wilde's case* (c). In the case of *Hart v. Prater* (d) it has been decided that the question of what are necessities is a Jury question. The cases of *Ingleden v. Douglas* (e) and *Trueman v. Hurst* (f), which will be relied on by the other side, were decided on the principle, that an account stated by an infant could not be given in evidence in an action brought against him after attaining his age, because he might be mistaken in the calculation of the items—which principle cannot be extended to admissions. Besides, the evidence was not rejected, because it was an admission of an infant, but on another ground—viz., because it was a stated account; which is in our favour.

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Mr. O'Shaughnessy, and Mr. O'Brien, Q. C., *contra*.—If the admissions of infants are to be received in evidence against themselves, the infant may represent his circumstances, and his health, to be such, that the plaintiff may safely in all cases contract with him, without further inquiry, and so neutralize the protection which the law affords him.—[*Per Curiam*. Such admissions by the infant would be only *prima facie* evidence against him.]—Here the Court impose on him the necessity of bringing forward evidence to contradict his own statement, and so to degrade his moral condition; which we contend is likewise protected by the law. The analogy of criminal cases is incorrect; because the only question in criminal cases is, whether the infant is *capax doli*, or not, whereas in civil cases, there is no reference whatever to the capacity of intellect or understanding, but only to the fact, whether necessities or not, and which is the only exception in regard to his liability, and occasioned by the danger to which an infant might otherwise be exposed, of being allowed to perish: *Burghurt v. Hall* (g). The cases of *Ingleden v. Douglas* and *Trueman v. Hurst*, are clear authorities against the reception of such admissions as evidence; because in the former case the account stated was offered in evidence to prove the delivery of goods, and

(a) 8 Mod. 258; S. C. 2 Vent. 72; S. C. Carth. 79.

(b) 1 Moody, C. C. 37.

(d) 1 Jurist, 623.

(f) 1 T. R. 40.

(c) 1 Moody, C. C. 452.

(e) 2 Stark. 36.

(g) 4 M. & W. 729.

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was rejected; and if such a document was not admissible to prove that fact, how can it be contended that mere parol evidence is receivable to prove the same?—[JACKSON, J. A stated account by an infant is a nullity, and therefore could not be received in evidence at all.]—It is a nullity, because it is the admission of an infant. In the case of *Johnson v. Pie* (a), which was an action of deceit against an infant for false information, the judgment was arrested, on the ground, that any affirmation by an infant relating to a contract is void: *Milner v. Lord Harewood* (b); *Williams v. Watts* (c).

DOHERTY, C. J.

This case comes before the Court on a motion for a new trial, on the ground of the reception of illegal evidence by the learned Judge before whom the case was tried. The action was *assumpsit* for the recovery of the price of a horse; and the defendant having pleaded infancy, the plaintiff replied that the action was brought for necessities supplied to the defendant during his infancy. The issues were, whether the horse was sold and delivered to the defendant, and whether it was an article necessary and suitable to the rank and condition of the infant.

In the progress of the case in the Court below, some letters were produced on the part of the plaintiff, which had been written by the defendant during his minority—tendered in evidence—objected to on the part of the defendant—and admitted by the Judge. A witness also was produced to prove certain declarations made by the defendant at the time of the sale, and which were also objected to as evidence against him, because made when a minor; but which were admitted likewise by the learned Judge.

The case was sent to the Jury, and a verdict was found for the plaintiff; and the ground now put forward on the part of the defendant for disturbing this verdict, or entering a nonsuit, is simply the admission in evidence of these letters and declarations. I abstain from denominating them *admissions*, and term them *declarations*, conceiving as I do, that there is a decided distinction to be taken between the significations of the two terms.

Now, the Counsel for the defendant must, in the maintenance of their position and argument, go the whole length of contending for the proposition, that in an action brought against an adult for goods supplied during his minority, the declarations of the minor can in no case be received in evidence; and if so general a proposition were the law, we would scarcely fail to find it in some of the many text-books, or in some more distinct and conclusive authority. However, notwithstanding the research of the

(a) 1 Lev. 169; S. C. 1 Keb. 913.

(b) 18 Ves. 274.

(c) 1 Camp. 552.

Counsel who have argued this case, no such authority has been discovered. The case of *Ingleden v. Douglas* is merely a decision following up older authorities, to the effect that an infant cannot be rendered liable on an account stated, while in his minority; and that falls very far short of establishing what has been contended for by the Counsel for the defendant. Considering the absence of authority, or decided cases on the subject, and the silence of the text-writers, we may safely conclude that the law does not support the general proposition contended for. I confess, that the contemplation of the consequences that might ensue from the establishment of such a doctrine, has had much influence on my decision; and I have no hesitation in coming to the conclusion, that the evidence was properly received, and that the verdict ought not to be disturbed.

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TORRENS, J.

I concur in the judgment of the Court, as delivered by my Lord Chief Justice, and on much the same grounds as those stated by him. The question for the Jury was, whether the articles supplied to the defendant were necessities or not; and it was for them, in deciding that question, to draw their inference derivable from facts. Here, the declaration of the defendant was a statement of a fact, from which the Jury were to decide, whether the articles supplied by the plaintiff were necessities or not; and was not to be taken as an admission by him of their being necessities. It was quite immaterial from whence they derived the knowledge of that fact; and there was no evidence on the other side to show that his declaration was not in accordance with the true state of the case. The declaration was left to the Jury as a fact (as I have observed), not as an admission of an infant; and it was for them to draw their own conclusions. It is somewhat remarkable, that though there have been a long series of authorities bearing on the subject, reviewed in the argument, yet that the principle contended for here, and which would, if a true and correct principle, have decided all those cases, was never enunciated in one of them; and this silence, I conceive to be a confirmation of the view which the Court has taken of the law as applicable to the case now before us.

BALL, J.

I also concur in the judgment of the Court. At the trial, I considered the evidence to have been admissible; and I have learned nothing since to alter that impression. On the contrary, the view I then took of the law has been confirmed by the silence of all the cases which have been decided for centuries, respecting such a principle as that contended for on the part of the defendant.

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I am likewise of the same opinion, that the Judge was right in admitting the disputed evidence at the trial; and I, therefore, concur in the judgment of the Court. There is no case, at least none has been cited, against the reception of such evidence; and it is incredible to me, that the principle on which it would be rejected, if it existed, would not have been distinctly announced in some of the many cases which have arisen on the subject. If the argument on the part of the defendant be well founded, it would go the entire length of excluding from evidence all matters connected with the contracts of a party while under age, when, at the same time, it is well settled, that they are capable of confirmation by him after attaining his age; and which confirmation could in few cases, if any, be rendered effectual, if such evidence was to be held to be wholly inadmissible. Again, take the case of slander after attaining full age; and what better evidence could there of malice on the part of the defendant, than slanders against the plaintiff uttered before that complained of, though uttered while under his age? and yet, on the principle contended for, the plaintiff would be restricted from giving such evidence. We were pressed with the case of a stated account by an infant, which was ruled to be inadmissible; and the argument that to reject the stated account, and to admit the declaration, would be an anomaly. But the principle on which the former is rejected is plain, and that is, that an infant cannot be sued on a stated account, inasmuch as it has been decided to be a nullity, and which, therefore, could not be used in evidence. It stands on the same principle as the other cases of the execution by an infant of a deed containing recitals; in which case, such recitals are inadmissible as evidence against the infant, because the deed is void as against him. On the whole case, therefore, I am of opinion, that the Judge was right, and that the verdict must be allowed to stand.

Let the cause shown be allowed.

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Common Pleas.

LONG v. BARRETT.

May 1.

TRESPASS ON THE CASE, FOR LIBEL.—The declaration was filed as of Michaelmas Term 1845, and contains three counts. The first of them, after reciting that the plaintiff exercised and carried on the trade and business of a coachmaker in an extensive way, in a certain place called Mary-street, in the county of the city of Dublin; and that in the exercise of said trade, he had frequent dealings with divers of her Majesty's subjects, of the highest character and respectability, without reference to political or religious distinctions; and that plaintiff was and had been a Justice of the Peace for the county of the city of Dublin, and had frequently served on the Grand Jury of the county aforesaid; and also had served as Special Juror on the trial of issues and causes depending in the Superior Courts; and also reciting a visit of his Excellency Wm. Baron Heytesbury, Lord Lieutenant General and General Governor of Ireland, to plaintiff's establishment in Mary-street, for the purpose of inspecting same; and further reciting an order received from the said William Baron Heytesbury for a carriage to be built and manufactured at the plaintiff's establishment in Mary-street aforesaid—charged the defendant, that wickedly and maliciously intending, wrongfully and injuriously to defame said plaintiff, and to injure and damnify him in said trade and business of a coachmaker, and in his credit and reputation therein, and to prevent and deter such persons as might be connected with her Majesty's Executive Government in Ireland, as well as other subjects of our said Lady the Queen, from having dealings with said plaintiff in the way of his business; and also intending to vilify and defame said plaintiff, and cause it to be believed that he had been, and was, corrupt, dishonest, and unworthy of patronage in his said trade; and also to render said plaintiff odious and subject to contempt and hatred—he (on the 19th of August 1844) falsely and maliciously composed and published, and caused and procured to be composed and published, in the *Pilot* newspaper, the following false, scandalous, and malicious libel of and concerning the plaintiff, that is to say:—"What possessed Lord Heytesbury (meaning the said Lord Lieutenant), if he knew any thing about the country, to make his first visit (and that carefully puffed) to Long the coachmaker (meaning thereby the said plaintiff), if mere trade was his (meaning thereby the said Lord Lieutenant's) object? He (meaning thereby the said Lord Lieutenant) had several respectable

A Town Councillor of the Borough of Dublin is exempt and disqualified from serving on any Special Jury summoned on trials in the Superior Courts. And the objection may be taken advantage of, either before the officer at the striking of the Special Jury, or by a challenge to the polls, when the Juror comes to be sworn.

In an action of libel against the editor of a newspaper, the defendant pleaded the general issue and the special plea given by the 6 & 7 Vic., c. 96, s. 2. *Held*, that libels published in the same newspaper, and during the same editorship, more than six years before the publication of the libel complained of, were properly received in evidence on the part of the plaintiff; the Judge having directed the Jury not to take the said prior publica-

tions into consideration in estimating the damages, but only for the purpose of ascertaining the *animus* of the defendant.

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"houses open to him (meaning thereby that the house and business of the plaintiff were not respectable, and that the said visit was made for political objects); but Long (meaning thereby the plaintiff) was a noted Jurymen of the sort much wanted (meaning thereby that the plaintiff was known to be a person who acted, and would act dishonestly, as a Jurymen). Long (meaning thereby the plaintiff) was a feeble, talentless, vulgar (as a matter of course), but very brilliant, member of the old exploded Corporation of Dublin, not one of whose members has ever yet been returned, even by conservatives, to the new Corporation; and, therefore, it was that the camarilla instigated their dupe, and predestined victim (meaning thereby the said Lord Lieutenant), to go to Long's (meaning thereby the coachmaking establishment of said plaintiff in Mary-street aforesaid), in order to commit him (meaning thereby the said Lord Lieutenant) still further with the people. We take a view of these passing events (meaning thereby, amongst other things, the visit of the said Lord Lieutenant to the said establishment of said plaintiff), trifling, perhaps, in themselves, but indicative of what are no trifles, that at least, in going the high road of execration, Heytesbury (meaning thereby the said Lord Lieutenant) may see his way, and have no excuse that he erred by accident or ignorance of the facts which indicate and influence injustice and misrule, and in their train, public execration."

The second count charges defendant with further wishing to vilify said plaintiff, and intending to injure and damnify plaintiff in his trade and business, and in his credit and reputation therein, on the 19th of August 1844, in publishing, or causing and procuring to be published, a similar libel to that in the first count.

The third count charges that the plaintiff, being a coachmaker, and exercising said trade, in the exercise thereof, received an order from the said Lord Lieutenant, to supply him with a carriage; yet the defendant, contriving to injure plaintiff in the said trade and business, composed and published a certain other false and malicious libel, similar to that in the first count, varying slightly the innuendoes.

The fourth count charges that, before the publishing of the libel, the defendant used the expression "noted Juror of the sort much wanted," for the purpose of expressing, and it was understood by persons to whom the said libel was addressed, to express, and imply, a man who would act dishonestly as a Juror, by giving a verdict for political and party motives, and act according to the evidence on which such verdict should be founded. Yet, the defendant, intending to cause it to be believed that the plaintiff had, on some one or more occasions, conducted himself where he had acted as a Juror, in such manner as that he had been influenced by dishonest and corrupt motives, and acted from political bias and partizanship, did, on the 19th of August 1844, publish a certain

false and malicious libel. The libel was set out in similar terms to that in the other counts, but stops at the expression "*noted Jurymen*."

To the above declaration, the plaintiff filed on the 22nd of November two pleas. The first was the general issue; and the second, a plea given by Lord Campbell's Libel Act (6 & 7 Vic. c. 96), to the following effect, viz., that the libel was published without actual malice, and without gross negligence; and that after the insertion of the said supposed libel, in the said *Pilot* newspaper, and at the earliest opportunity after the commencement of the action, to wit, on the 20th day of November 1844, a full apology for the said supposed libel was inserted in the said *Pilot* newspaper. The plea then sets out the apology, and avers that the defendant on the same day, paid into Court the sum of £2 to the credit of the cause, with an immediate undertaking to pay the costs. The plaintiff joined issue on the first plea; and as to the second, he traversed the denial of malice and negligence, and of the allegation that the apology was inserted at the earliest opportunity, and also of its being a full and ample apology.

At the Sittings after Hilary Term, the cause was brought to trial before the Lord Chief Justice; and on the Jury (a Special Jury) presenting themselves in the box, Counsel for the plaintiff challenged, or proposed to challenge, John Pearson, one of the said Jurors, on the grounds that he was disqualified, he being a member of the Town Council. To this challenge, the defendant pleaded "that the said John Pearson is not *now* a member of the Town Council for the time being of the city of Dublin;" and the plaintiff having joined in issue, and the issue having been found against the defendant by the triers, the defendant objected that the Chief Justice ought not to have received the said challenge, inasmuch as that an objection to a Special Juror grounded on a disqualification, could not be made at the trial, but should have been made at the time the Jury were struck and empanelled. The Chief Justice overruled the objection, and the defendant excepted to the said ruling of the Chief Justice, on the grounds aforesaid. The trial then proceeded, and the plaintiff produced (among other things) in evidence, the *Pilot* newspaper of 19th August 1844, containing the libel, which was the subject matter of the action; and also offered in evidence a certain other article contained in the said *Pilot* newspaper of the 27th day of January 1834, to the reception of which the defendant objected on the following grounds:—"Because that said article was published before the libel, the subject of the present action; and also, because that the said article was not published within six years next before the commencement of this action, or before the present cause of action accrued; and also, because that the said article was not necessary for the purpose of explaining any ambiguity on the

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E. T. 1845. “face of the libel; and also, because that the said article (if any) was a
Common Pleas. “separate and distinct libel, and should form the subject of a distinct
 LONG “action; and also, because that the said article had no connection with
 v. “the libel stated in the declaration; and also, because that the said libels
 BARRETT. “do not refer to the said article.” The Chief Justice, however, held and
 affirmed that the said evidence so offered was good and admissible, as
 evidence of the intention of the defendant, and his motives, and as a cir-
 cumstance to prove malice in publishing the libels stated in the decla-
 ration. To this ruling, the said defendant excepted on the foregoing
 grounds. The plaintiff then proved the said article, which was in the words
 following:—“Incompetence of the House of Commons as constituted.
 “Mr. Long suggested to Mr. Hynes, that an address to his Majesty, to
 “be presented at the next Levee at St. James’s, by one of the Sheriffs,
 “should be substituted in lieu of a petition to Parliament; as it was
 “useless to expect, that the House of Commons, constituted as it was,
 “would attend to their representatives.” Mr. Hynes fully concurred in
 “Mr. Long’s observations with respect to that House. Mr. Long and
 “Mr. Hynes were both on our Jury, yet it was on precisely the same
 “sentiments, only expressed in a more qualified manner, that these two
 “gentlemen found a verdict against us of guilty. It was for this, fear-
 “lessly expressed by them, expressed with a belief of its truth, a reliance
 “on its legality, and on its perfect impunity in their own cause—it was
 “for this that they consigned us to the mercy of the King’s Bench.
 “For this, we were doomed, in that mercy, to six months’ imprisonment.
 “For this, the scoundrel who lies for the Whigs—for this, Conway of
 “the *Post* endeavours to deprive us of even the solace of public sym-
 “thy, by classifying our offence, which, even if one, is only political, with
 “an offence which was manifestly a notorious breach of morality—a
 “violent illegal outrage against a public functionary, in the legitimate and
 “gentlemanly discharge of his official duty. If we offended against law,
 “you, Messrs. Long and Hynes, who judged us guilty, are yourselves
 “participants in our offence.

The plaintiff then offered in evidence certain other articles published in
 the same *Pilot* newspaper, bearing date respectively as follows; and
 which articles were objected to on the part of the defendant, for the reasons
 aforesaid, and were admitted in evidence by the Chief Justice, on the
 grounds aforesaid. The said articles were of the dates and effect fol-
 lowing, respectively.

March 27th, 1835.—“Mr. Recorder Conservative Partizan Shaw has,
 “it appears, inflicted another speech on the House, for no other imagi-
 “nable purpose, that we could divine, but the contradiction of that
 “horrible calumny put forward by papists and rebels, that the securities
 “for the Dublin petition, Messrs. Perrin, Lord Mayor, and Willy Long,

"Juror and coachmaker, were not securities for £500. Mr. Recorder
 "Factionist Shaw has done more, he has with all the blandishments of
 "that perpetual simper playing round his piteous face, which invariably
 "denotes honesty of heart, not only said that the securities for the
 "Dublin petition, Messrs. Perrin, Lord Mayor, and Willy Long, Juror
 "and coachmaker, were securities for £500, but the said Shaw has, in his
 "own dimpling way, and whenever he makes himself up, gratuitously
 "informed the public that the sureties were worth £20,000 each. Now,
 "this is a pleasant fact to ascertain; and that it is true no one can doubt;
 "for, with respect to one of the sureties, Perrin, that man has the stamp
 "of wealth, and its accession can be accounted for. And as to the
 "other, Long, we have the fact from the dimpling Recorder himself, a
 "man whose superior claims to sanctity are proved by his inviolable
 "adherence to truth. Well then, Willy Long is worth £20,000; we are
 "glad to hear it, and so, we are sure, will many others. We suppose
 "he will give up special juryism, corporationism, and all handicraft trade;
 "and, with such a fortune, turn gentleman. The change would be
 "desirable, the process pleasing, and the transmutation complete."

May 11th, 1835.—"Here is the pious Shaw for you, here the chival-
 "rous, high-minded, honourable, and what not, Harding; and to descend
 "to a far lower grade of the human species, here is Long, the little
 "coachmaker, for you, whose blushing purity was so outraged forsooth,
 "by some imputed attempt by Lord Anglesea, as his tradesman. Here,
 "the purity, the moving springs, the puppets; and we have only to turn
 "to evidence before the Commissioners to decide what they are, and
 "what the judgment of the public will be."

June 27th, 1854.—"We publish a correspondence between a gentle-
 "man of the name of Phibbs, and the noted Long, of jury, corporation,
 "and election notoriety; and our first exclamation was, what every one
 "of sense has made, at the first moment of seeing it, Mr. Phibbs should
 "not have condescended to notice such a fellow. If he knew the party
 "as well as they are known here, he would not notice such men as
 "M'Cleery, the Butlers, and the Longs—men in the very lowest scale of
 "human nature. Long ought to continue at his work in his leather
 "apron, and be in his own small way in his smithy respectable enough as a
 "tradesman; but being the member of a body like the Dublin Common
 "Council, does not entitle such as Long to the notice of a gentleman.
 "With the exception of this, Captain Phibbs had the best of it. Long
 "retracted the personality in double quick time; but he could not," &c.

July 3, 1837.—"Orange Juries and Magistrates. There was no
 "essential difference between the Juries which did the work of the
 "Attorney-General in our case, and that which did the work for the
 "Orange Magistrates in the prosecution of Mr. Gore Jones. The latter
 "only wanted the help of the blacksmith, Billy Long, to finish its con-

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"struction, to add to its rancid Toryism and innate vulgarity, the man in manners and station low, as well as virulent in politics. Where was that tried and trained fag of the faction on this appropriate occasion? But the Dublin Corporation can, it seems, complete a Jury without the help of all its cords. In our case, formerly, the Corporation verdict was as much given for Blackburne as against O'Connell.

July 31, 1837.—"If that be the case then, and it will be acted upon, how much more criminal is it to vote here, as the criminality of the party here is boundless and notorious? the guilt may reflect horror at this intimation. Oh, will you invade the purity of election? This was the cant when Billy Long the blacksmith pretended some attempt was made to influence his vote as carriage builder to Lord Anglesea. What amiable horror we had on that occasion! But not one word about Sir H. Hardinge, when it was proved he tampered with all the officers of public departments in Dublin. There is no violation of the constitution in refusing offices of trust to those who prove unworthy of them."

Other evidence, which was unobjected to, was then given on the part of the plaintiff; and the Lord Chief Justice then left to the consideration of the Jury the several matters aforesaid, and (among others) the said several articles of the 27th of January 1834, 27th of March 1835, 11th of May 1835, 27th of May 1835, 3rd of July 1837, 31st of July 1837, as evidence of the motive and intention of the defendant, and to show that he was actuated by malice in publishing the libel in the first count of the declaration stated; but charged the Jurors that they should not consider the said articles, or any of them, as the subject of damages, or in aggravation of damage; but solely and only to explain the intention and animus of the defendant.

The Jury found a verdict for the plaintiff, with £150 damages.

The bill of exceptions now came on to be argued.

Sir Colman O'Loughlin, and Mr. Henn, Q. C., in support of the exceptions.

Two questions have been raised by the exceptions on this record. The first is, as to the disqualification of a Juror by the 180th section of the Municipal Act.* The second is, as to the admissibility of certain evidence tendered on the part of the plaintiff at the trial. We submit,

* 3 & 4 Vic. c. 108, s. 180.—"And be it enacted, that after the time when this Act shall come into operation in any borough, every member of the Council for the time being of the borough, and Justice assigned to keep the peace therein, and the Treasurer and Town-olerk for the time being of every such borough, shall be exempt and disqualified from serving on any Jury summoned within such borough respectively, save and except the Juries summoned for an Assize or jail delivery."

in the first place, that the section of the Municipal Act in question does not apply to any except the Recorder's Court, or other inferior jurisdictions,* and those which regulate the practice in the same;† and therefore, ought to be construed as having application to such alone. Besides, it is admitted that Town Councillors serve on Special Juries at all the Assizes. But, even admitting that this enactment does extend to the Superior Courts, we contend that a challenge does not lie to a Special Juror; but that the objection, if any, should have been made before the officer at the time of striking the Jury. Special Juries were unknown in early times; and the earliest mention to be found of one is in the year 1655: *Vin. Ab. Trial, D. C. 2*; and antecedent to the 3 G. 2, c. 25 (*Eng.*), they were struck by consent. On principle, a challenge does not lie to a Special Juror: *The King v. Sutton (a)*. In early times, the nearest analogous case was that of the Sheriff returning, in the case of a writ of right, four knights, by whom twelve others were named and chosen in the presence of the parties, and returned to try the issue; and in which case it was held, that to the Jurors so returned no challenge would lie, the proper course being to make the objection before the said knights: *Pigott v. Clarke (b)*; *Co. Litt.* 473, n. 15; *Co. Litt.* 294, a., 158, a.; *Vin. Ab. Trial, L. D.* The same principle applies to Special Juries; and the whole policy of the Jury Act (3 & 4 W. 4, c. 91) is in conformity with the old law, and is framed with the view to prevent the challenge of a Special Juror at the trial. The 20th section gives a challenge for defect of qualification in a Common Juror; but it distinctly provides that nothing therein contained shall in anywise extend to a Special Juror; and the 25th section provides for the case of Special Juries, and regulates the manner of striking them before the officer of the Court, who is empowered, on any incapacity being proved to his satisfaction, to set aside the Juror, and proceed to draw the name of another. The 29th section provides for the case of Corporation suits, and that no challenge for collateral affinity to a corporator shall be allowed beyond certain limits; and the 30th section invests the officer with the power of

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(a) 8 B. & C. 419.

(b) Year Book, H. T. 30 *Eliz.*

* 3 & 4 Vic. c. 108, s. 175, creates the Recorder's Court, and establishes the limits of its jurisdiction.

Sections 176-7, relate to the Clerks of the Crown and Peace in boroughs, and of the officers of the Recorder's Court.

Section 178 provides for the non-abatement of existing suits in the Recorder's Court.

Section 179 regulates the qualification and duties of Jurors in the Recorder's Court, and the Court of Sessions of the Peace.

Section 180 enacts, "that after the time," &c. (*vide ante*, p. 444, n.)

† Sections 181-2-3, regulate the proceedings and practice in the Recorder's Court, and the qualification of attorneys practising therein.

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striking out the name of the party so objected to, if the objection shall, on inquiry, turn out to be well founded, and of substituting another. Thus the statute, in all these enactments, contemplates the opportunity and necessity of the objection being made before the officer: *The King v. Sutton* (a). A challenge *propter defectum* will not lie in any case, and that is the nature of the challenge in this case. Moreover, the challenge put in by the plaintiff in this case is bad in form, inasmuch as it tenders an immaterial issue. A challenge must, in all cases, be precise and formal; and the rule is, that if the challenge does not disclose a legal ground of objection, it is bad, and we may except to its being received; but if received, we may either demur or take issue. If we had demurred, we should thereby have admitted the facts which were properly stated; but if we took issue, and the issue is found against us, we have a right to insist on the challenge having been informal, as it should have stated, not only that he is now a member of the Town Council, but that he had become so since the striking of the Special Jury: *Vin. Ab. Trial, M. C.*; for if he had been such member before the Jury was struck, the objection should have been made before the officer; and the pleading over would not cure the defect. "So particular were they in this respect in early times, where challenges were more in use, that it was made a question in 27 H. 8, 13 B., pl. 38, whether it was a fatal defect that it concluded without an '*hoc paratus est verificare*;' and it was because many precedents were shown without such admission, and the Judges did not choose to depart from the precedents, that it was held to be necessary."—*Per Abbott, C. J.*, in *King v. Edmonds* (b). The right mode of taking advantage of such a defect is by bill of exceptions: *Bulter, N. P.* 316; 2 *Inst.* 426; *Dyer*, 231, n. 3; *Rex v. Higgins* (c).

As to the second objection, this is the first time the question of the admissibility in evidence of publications prior to the libel complained of, has come before the full Court. The dates of the articles in question are material, as it appears that the latest of them was published more than six years before the subject matter of the action. In an action of libel, the plaintiff cannot give in evidence other libels concerning him, unless they directly refer to the libel set out in the declaration. The earliest case on the subject is *Finnerty v. Tipper* (d), which has been followed by several others; but none of them at bar until the case of *Pearson v. Lemaitre* (e), in which, and the other cases referred to, it was held that subsequent publications are admissible when they refer directly to the libel; but publications anterior to the libel, or not directly referring to it, are not admissible, or if admissible, they must have been published within

(a) 8 B. & C. 419.

(b) 4 B. & A. 474.

(c) Sir T. Raym. 486.

(d) 2 Camp. 72.

(e) 5 M. & G. 700; S. C. 6 Scott.

six years. If such were admissible, libels published twenty or thirty years before might be given in evidence, for some of which ample apologies may have been made and accepted; and the defendant would be wholly unprepared with evidence on the subject, though, if prepared, he might have been able to prove that they had not been written by him, or that they were written under circumstances which might justify them: *Warns v. Chudwell* (a). In the case of *Lee v. Huson* (b), Lord Kenyon ruled that if the words offered in evidence are themselves actionable, they are not admissible; so that the publications admitted in this case ought to have been rejected: *McCleod v. Wakley* (c). *Symmons v. Blake* (d) is the only case in which prior words were admitted as evidence of malice, but it was on the ground that they were similar to those which were the subject of the action, which cannot be said to be the case with respect to the publications admitted here. Therefore, to admit the evidence offered in this case, is to carry the law a step further than it has ever yet been carried.

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Mr. West, and Mr. Napier, Q. C., contra.—As to the first question, the cases and arguments relied on by the other side, to show that the objection to the Special Juror should have been made before the officer, do not apply; for the issue taken on our challenge is, whether the Juror objected to was, or was not, a member of the Town Council *at the time of the challenge*, and not whether he was such member at the time the Jury was struck before the officer; and if he became a Town Councillor between the time of striking the Jury and the trial, there is no other way in which his disqualification could be taken advantage of, except by challenge. The question as to the proper time of taking the objection might have been raised by the pleading to the challenge, if it had been the fact that the Juror was a Town Councillor at the time the Jury was struck; or they might have demurred to the challenge, if it was informal, in not making such an averment, if it were necessary; but as the pleading now stands, it must be taken that the Juror became a member of the Town Council subsequent to the Jury being struck, and, therefore, could not have been objected to before the officer; admitting that the objection, if it existed, must then be taken. The Jury Act mentions several disqualifications which must be taken before the officer at the time of striking the Jury, but the holding of the office of Town Councillor is not, and could not be among them, inasmuch as such an office was not in existence at the time of passing that Act; and the Municipal Act, which created the office, expressly disqualifies the holder of it from serving on a Special Jury. Therefore, to deny to us the right of chal-

(a) 3 Esp. 133.

(c) 3 Car. & P. 301.

(b) 1 Peake, 223.

(d) 1 M. & Rob. 477.

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lenge where the objection could not have been taken before the officer, as in this instance, would be to repeal the Act in that particular. But it has been asserted that a challenge *propter defectum* to a Special Juror did not exist at common law, and has not been given by any statute. But this is a challenge *propter affectum*, disqualification implying a previous qualification. Blackstone, following Lord Coke, divides challenges into four heads: 3 *Bl. Com.* 361; and it is clear, on an examination of these heads, that the challenge in the present case falls within the definition of a principal challenge *propter affectum*; one of the instances under that head being, that the Juror is of the same society or corporation of the party to the suit. The Jury Act, and the Courts on several occasions, have recognised and contemplated a challenge to a Special Juror: *Queen v. Sullivan* (a). The 30th section of the Jury Act contains a saving of all powers which Courts and Judges had in regard to Juries, except where such powers have been altered by the Act; and there is no question but that the Superior Courts originally introduced, and had full jurisdiction and control over the selection of Special Jurors; for they took their rise from the practice of the Courts, and were adopted by the Legislature. Formerly, all trials were at the bar of the Court; and in important cases, properly qualified persons were selected by the officer of the Court to serve as Special Jurors on those trials. The first motions for a Special Jury to be found in the books are in the cases of *Pooley v. Markham* (b), and *Phillips v. Crab* (c); and the first mention of them in the statute law is in the 3 *G. 2*, c. 25, s. 15 (*Eng.*), which directs them to be struck in the Courts as they had been in trials at bar; and the 17 & 18 *G. 3*, c. 45 (*Ir.*), contains a similar enactment for this country; and the 9th section provides that a *tales* shall be ordered in Special Jury cases, in case of a default of Jurors by reason of challenges by either of the parties. The 3 & 4 *W. 4*, c. 91, s. 28, contains a similar enactment, showing that the Legislature contemplated and recognised the existence of a right of challenge in the case of Special Jurors. The case of *The King v. Sutton* (d), which is also reported under the title of *The King v. Despard* (e), is in our favour; for, by the 3rd section of the Jury Act, an alien is disqualified; and by the 20th section, a want of any of the previous qualifications shall be good cause of challenge to a common, but not to a Special Juror; and it is on this ground solely that the decision in that case is put by Lord Denman in his judgment.

As to the second question raised by the bill of exceptions, viz, the admissibility of the libels on the plaintiff published by the defendant

(a) 1 P. & D. 96.

(b) Styles, 477.

(c) 12 Mod.

(d) 8 B. & C. 417.

(e) 2 M. & R. 406.

six years before the commencement of this action, they were offered as evidence of the *animus* of the defendant towards the plaintiff; and the Jury was expressly charged by the Chief Justice at the trial, not to give any damages as regarded them. It may be argued that the authorities and text-writers have confined the admissibility of such evidence to those cases alone in which the *animus* may be doubtful; and admitting such to be the principle, the libel which has been complained of in this case might, from its extent and licentiousness be considered to have been more injurious to other parties mentioned in it, were it not for the series of previous publications, which show that the plaintiff was the party specially aimed at. Moreover, these previous publications were peculiarly admissible on the issues of malice and gross negligence, raised by the special plea given by the late Act of Parliament (6 & 7 Vic., c. 96). We admit that most of the authorities on the subject are instances of subsequent publications having been admitted in evidence, for the purpose of showing malice; but that has naturally arisen from the circumstance of parties having generally commenced actions on the appearance of the first libel; and the principle on which they are admitted at all applies to one case as much as to the other. The Statute of Limitations which has been relied upon has no application. Before that statute, the right of action was commensurate with the joint lives of the libeller and the libelled, and the statute has had the effect of cutting down that right to six years, thereby only barring the remedy, without discharging the malice, which remains, and can be used for any purpose but that of founding an action upon it. On the contrary, the circumstance of the Statute of Limitations having barred our right of action on these libels, takes away the only argument against their admissibility; for they cannot be made the subject of another action. They are, all of them, obviously conceived in the same strain of thought, and exhibit the same continuous rankling as the libel complained of, and are, therefore, admissible as evidence of the malice which dictated it. The Judge at the trial having cautioned the Jury not to give any damages on account of the libellous publications admitted in evidence, the case of *Pearson v. Lemaitre*, in which all the authorities on the subject are collected, is exactly in point, and rules these exceptions in favour of the plaintiff.

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DOHERTY, C. J.

This was an action on the case for a libel, brought by the plaintiff, Mr. Long, a coachmaker, against Mr. Barrett, the editor of the *Pilot* newspaper, for certain publications which appeared in that paper, reflecting on the character of the plaintiff, and calculated to injure him in his business as a coachmaker. The defendant pleaded two pleas: first, the general issue; and secondly, that the supposed libel had been inserted in

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the said newspaper without actual malice, and without gross negligence on the part of the defendant; and that after the insertion of the supposed libel, and at the earliest opportunity after the commencement of this action, a full apology for the supposed libel was inserted by the defendant in his newspaper. The case came on to be tried before me in this Court, at the Sittings after last Hilary Term, by a Special Jury—when, on proceeding to swear the Jury, a challenge was tendered on the part of the plaintiff to John Pearson; and what took place on that occasion, I shall now read from the bill of exceptions—[Here his Lordship read that part of the bill of exceptions which relates to the challenge of the Juror.]

The questions which arise on this exception, are, first, is a Town Councillor disqualified from serving as a Juror on a trial at *Nisi Prius* in this Court? and secondly, supposing him to be disqualified, can the objection to a Special Juror be taken by way of challenge? On the part of the plaintiff it is insisted, that a Town Councillor is disqualified from serving as a Juror by the 180th section of the Municipal Act, the 3 & 4 Vic. c. 108; by which it is enacted, "That after the time when this Act shall come into operation in any borough, every member of the Council for the time being of the borough, and Justice assigned to keep the peace therein; and every officer of police therein; and the treasurer and town-clerk for the time being, of every such borough, shall be exempt, and disqualified from serving on any Jury summoned within such borough respectively, save and except the Juries summoned for an assize or jail delivery." On the part of the plaintiff, it is insisted, that this is a clear and explicit enactment, that a Town Councillor for the time being is disqualified from serving on any Jury summoned within such borough; and the triers having found that Mr. Pearson is now (that is to say, at the time of the trial) a Town Councillor, he was disqualified from serving on the Jury. On the other hand, the defendant insisted that this disqualification did not extend to the Superior Courts, but merely to Juries summoned in the Inferior Courts, within the local jurisdiction; and he has relied on the sections which precede and follow the 180th section of the Municipal Act, as showing that the Legislature was merely dealing with, and regulating Juries in the Inferior Courts. But I do not think, that the words "shall be exempt and disqualified from serving on any Jury summoned within such borough," can be limited and restricted in the manner contended for.

I am aware, that holding that this exemption and disqualification extends to Juries summoned in the Superior Courts, may produce an effect, that Jurors will be exempt, as Town Councillors, in the city of Dublin, while in other boroughs they are not exempted and disqualified from serving on Juries at the Assizes. It is no part of our duty to speculate on what may have been the intentions of the Legislature in that respect; but there may be reasons for disqualifying Town Councillors in

Dublin, which do not extend to other jurisdictions; for instance, the exemption of Town Councillors in so extended a jurisdiction was not likely to diminish the list of Jurors to such an extent as to render it inconvenient. In the next place, their duties in the borough of Dublin may have been considered so onerous and continual, that with the frequency of the trials in these Courts, both during and after the Sittings, a Town Councillor would be liable to be so often called upon, as to interfere with those duties. That alone might be a sufficient reason for the existence of such a distinction; but independent of any reason, the words of the enactment are so general and comprehensive, that it appears to me to be impossible to cut them down.

It was also contended, on the part of the defendant, that even if the disqualification extended to Jurors in the Inferior Courts, that Jurors summoned for trials at the *Nisi Prius* Sittings in this Court fell within the exemption in the 180th section of the Municipal Act; for that in strict legal parlance, the Sittings at *Nisi Prius* in these Courts are an Assize. Many authorities were cited to establish this point; but I think that the Sittings at *Nisi Prius* in this Court cannot be regarded as an Assize, in the sense in which that expression is used in this enactment.

It was next insisted, on the part of the defendant, that even supposing that a Town Councillor is disqualified from serving as a Juror on any Jury summoned in the Superior Courts within this borough, still that no challenge lies to a Special Juror. To establish this point, much legal research has been resorted to; but I confess, that it strikes me, that the learning expended on this part of the case, has been more curious than useful towards the decision of the point contended for; as a perusal of the Acts relating to Special Juries, to which our attention was particularly directed by my Brother Torrens, and more particularly the 17 & 18 G. 3, shows that a challenge to the poll, in the case of a Special Juror, was a recognised proceeding; and the case of *The Queen v. Sullivan and others*, reported in 1 *Perry & Davison*, p. 96, shows that Lord Denman did not appear to entertain a doubt on the subject. This being so, the defendant was obliged to narrow his objection, and insist, that an objection by way of challenge to a special Juror could be only *propter affectum*, and not *propter defectum*. I am not aware, that in the very able arguments which have been put forward by Counsel, any authority has been cited to support this distinction; but even were such distinction well founded, I should say that the objection here savours more of a challenge *propter affectum*, than *propter defectum*; and the authorities in *Blackstone's Commentaries* would seem to bear out this view.

But it has been insisted on, that whatever may have been the law previous to the passing of the present Jury Act, that want of qualification according to that Act, shall be a good cause of challenge to a

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Common Juror, but shall not extend in any way to any Special Juror. It is admitted, that the disqualification resulting from being a Town Councillor, is not contained in the Jury Act, 3 & 4 W. 4, c. 91, but is created by the 6 & 7 Vic., c. 108; and it is said, that these Acts being in *pari materia* are to be construed together; and that the disqualification contained in the subsequent Act is to be regarded as if incorporated in, and forming part of the prior Act. I do not dispute either of these positions; but an attentive consideration of the two Acts will show that it never could be considered as within the intention of the Legislature, by the provisions of the 20th section of the Jury Act, to take away the right of challenge for a disqualification arising from being a Town Councillor, which was created by the Municipal Act passed seven years afterwards. Look to the manner in which the Jury Act is framed. It first deals with the qualification of the Common Juror; and then we find a proviso at the end of the 20th section, to the effect, that hitherto the Legislature had been dealing with the qualifications of Jurors generally, and was then proceeding to that of Special Jurors; and in doing so, the ancient mode of objecting to the Juror is expressly saved, except in the particular cases thereinbefore specified; and the right of challenge is only taken away with respect to Jurors not qualified according to that Act.

We have been pressed with the authority of *The King v. Sutton* (8 B. & C. 417); but it will be observed that the decision in that case turned altogether on a disqualification arising under that very Act; and differs materially from this case, in which it is sought to apply the proviso in one Act, taking away the right of challenge for want of the qualification required by that Act, to a disqualification created by another and subsequent Act.

On the whole, I am of opinion, that a Town Councillor is exempt and disqualified from sitting on any Jury summoned within the borough of which he is (for the time being) a Town Councillor. I think the objection may be taken advantage of, either before the officer at the time of striking the Special Jury, or by challenge when he comes to be sworn. I do not think that the right to challenge is taken away by the provision in the 20th section of the Jury Act; and looking to the saving contained in the 25th section of the Jury Act, "that all other matters whatever relating to Special Juries, shall remain and continue in form as heretofore, except when the same, or any part thereof, is expressly altered by this Act," I think it is competent for either party to challenge any person who is clearly and expressly disqualified. For these reasons, I am of opinion that the first exception must be overruled.

With respect to the second exception, the ground of it is, that I admitted evidence at the trial which ought not to have been admitted; and the broad substantial question is, whether I ought to have admitted

publications which appeared from time to time in the defendant's paper, during the ten years which preceded the publication of the libel in question, to have been received in evidence for any purpose relating to the plaintiff. It is admitted on both sides, that my direction is free from all objection, in respect of the Jury having been warned that they were to take such evidence into their consideration, merely for the purposes of ascertaining the *animus* of the defendant, and not for the purpose of measuring the damages. This raises a question for the first time, and on which, after a careful review of the cases, it is admitted that the opinion of the Court is unfettered by authority. The question is, whether or not anterior publications can be given in evidence in an action of libel? On this question, there is, as I have already observed, no direct authority either in this country or in England, with the exception, perhaps, of a case decided by Mr. Justice Patteson, at Exeter, and which is adverted to by him in the case of *Pearson v. Lemaitre*, in 6 *Scott, New Reports*, p. 607. It is not my intention to go through all the cases which relate to this subject; but my object is to deal with the question on broad substantial grounds, without distinguishing the particular phraseology of Judges who have had to treat the subject at different times, and under different circumstances. I shall confine my observations to the case which comes nearest in principle to that under our consideration—I mean the case of *Pearson v. Lemaitre*, in which there is a minute review of all the authorities bearing upon the question. I agree with the judgment of Chief Justice Tindal in that case, where he says, “It is difficult “to reconcile all the *Nisi Prius* cases on this subject; and the point “does not appear to have been decided by any of the Courts in Westminster Hall. But upon principle, we think, that the spirit and intention of a party publishing a libel, is fit to be considered by a Jury “in estimating the injury done to the plaintiff; and that evidence “tending to prove it cannot be excluded, simply because it may disclose “another and different cause of action.” That observation I adopt, and say, with Chief Justice Tindal, that it is difficult to reconcile all the expressions of the Judges; and that we must, therefore, confine our remarks to the case under our immediate consideration. That case of *Pearson v. Lemaitre* goes a great way to decide the principle which ought to rule this case. That was an action for a libel: the plaintiff, in order to show *quo animo* the libel which was the subject of the action was written, gave in evidence two subsequent letters addressed by the defendant to third persons, containing substantially a repetition of the slanderous matter; such letters were ruled to have been properly received in evidence; and that their admissibility was not affected by the lapse of time intervening between the writing of the respective letters. Another objection taken to the admissibility of some of these documents, was, that they were not published within the period in which an action might have

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been brought on them. I cannot but think, that when all the publications in question have reference to the same subject matter, and all of them advert to the plaintiff in his particular trade or business, they ought to be admitted as evidence on an issue as to whether the defendant was actuated by malice or not; and the publications were admissible on such inquiry without reference to the Statute of Limitations. With respect to this point, I shall again advert to the judgment of Chief Justice Tindal, in the foregoing case of *Pearson v. Lemaitre*. He says, "Another argument against the admissibility of these letters in evidence, was founded on the length of time that elapsed between the date of the libel complained of, and these letters. But as it seems to us, that as they clearly relate to the same subject, the respective dates of the letters may affect the value, but not the admissibility of the evidence, and they were properly received." So in this instance, the reception of the publications in evidence, although bearing date beyond the period limited by the statute for actions on them, is a circumstance affecting their value, and not their admissibility.

For these reasons, I am of opinion, that these publications were properly received in evidence, and that, therefore, the second exception must be overruled.

TORRENS, J.

I concur in the judgment of the Court, as pronounced by my Lord Chief Justice; and though I might be satisfied in resting my opinion on the reasons which he has given, yet as the questions which have been discussed at the bar, involve principles which came before a Court of Law for the first time, and on the construction of recent statutes, I may, perhaps, be excused for occupying some portion of the public time, in stating some of the reasons which govern my mind in coming to the conclusions at which I have arrived.

It would be a waste of time to enter into an investigation of the nature and origin of the practice out of which the law, relative to Special Juries, sprang. It is sufficient to state, that several statutes have been passed, which have created qualifications and disqualifications, and established regulations which have been varied from time to time. The last of these statutes are the Jury Act (3 & 4 W. 4, c. 91), and the Municipal Act (3 & 4 Vic. c. 108); and I shall commence with the consideration of the latter of them, because it appears to me to afford an answer to the first exception which has been taken, to the effect, that the objections to the disqualification of the Special Jurymen should have been made before the officer at the time of striking the Jury. The 180th section of this Act creates both an exemption and a disqualification; and the conclusion at which I have arrived is, that we are to construe the Act, so as to give a party the opportunity of making his objection as to the disqualification,

at the same period as that at which the Special Juror himself could claim and take advantage of his exemption. The two expressions of "exemption" and "disqualification," occur in this section of the Municipal Act; and it would appear to be a fair rule of construction to give to the Juror the privilege of claiming his exemption, or to the suitor of urging the disqualification, at one and the same period of the proceeding. The exemption is the *privilege* of the Juror: it is the *right* of the suitor to insist on the disqualification. A Town Councillor, who is entitled to the privilege, may not be desirous of claiming his exemption; but should he think proper to claim it, it is clear that the time at which ~~HE~~ *must* make *his* claim, is when he comes to be sworn; inasmuch as until then, he is in ignorance of having been placed on the Special Jury. On the other hand, he himself may not wish to claim his exemption; and if he does not claim it, or wish to claim it, as was the fact in this case, the right to insist on the *disqualification* would, in my judgment, obviously devolve on the party to the suit. I, therefore, am of opinion, that the 180th section of the Municipal Act supplies an answer to the objection which has been made as to the time of insisting on the disqualification of the Juror. But, independent of this construction of the only section of the Municipal Act which applies to Jurors, I think that the several Special Jury Acts, which have from time to time been passed by the Legislature, put the *right* of the suitor to object to a Special Juror when he comes to be sworn, beyond all question. Amongst those, it is important to consider the provisions of the 17 & 18 G. 3, c. 45, which has been partially repealed by the late Jury Act, so far only as relates to Special Jurors for trials in counties at large. In the 9th section of this Act, it is enacted, "That in every cause wherein a Special Jury shall be awarded by virtue of this Act, and that a full Jury shall not appear before the Judge, &c., or after appearance of a *full* Jury, *by challenge* of any of the parties, the issue is likely to remain untried for default of Jurors, that the said Judges shall have authority to command the Sheriff to name twelve such other able men of the county then present, to whom no cause of challenge doth lie; and out of them so many shall be chosen by ballot as shall be sufficient to make up the Jury." Here, the power and right of challenging a Special Juror is expressly recognised by the Legislature, which shows that such a power existed previous to the passing of the Jury Act; and then the next question is, has that power been taken away? In my opinion, it has not, inasmuch as the 25th section of the Jury Act expressly provides, that all matters whatever relating to Special Jurors, should remain and continue in force as theretofore, except where the same, or any part thereof, has been expressly altered by that Act—and there is nothing in that Act to take away such a right; on the contrary, the 28th section recognises the right of challenge, and it only so far alters the provisions of the 17 & 18

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It is true, that in the cases of *The King v. Despard*, reported in 2 *Man. & Ry.*, or *The King v. Sutton* in 8 *Barn. & Cress.*, it was decided by Lord Tenterden, that a challenge did not lie to a Special Juror ; but the cause of challenge in that case was on the ground of one of the disqualifications imposed by the Act itself, namely, being an alien ; which, by the 3rd section of the Irish Jury Act, is stated to be a disqualification, and which, therefore, by the provisions of the 20th section of the Jury Act ; could not be made a ground of challenge in the case of a Special Jury.

I, therefore, concur in the opinion of the Court, that the first exception be overruled.

With respect to the second exception, I also concur with my Lord Chief Justice, as to the admissibility of the publications anterior to that complained of, as being applicable to both of the issues raised between the parties to the record ; one of them, the general issue, and the other, the plea which the defendant has been permitted to plead under the provisions of the late statute ; namely, that the publication did not proceed from actual malice, or gross negligence. Two issues having thus been knit between the parties, I shall first consider the case as it would have stood before the statute. There is no reported authority establishing, that publications in the case of libel anterior to that complained of, may be given in evidence ; and even with respect to subsequent publications, the law, up to the decision of the case of *Pearson v. Lemaitre*, seemed to be unsettled ; or in the words of Tindal, C. J., it was difficult to reconcile the different decisions which had taken place at *Nisi Prius* ; and therefore it is important to consider, whether in point of principle there exists any substantial reason why the one should be admitted and the other rejected. In the case of *Pearson v. Lemaitre* (5 *M. & G.* 700 ; *S. C.* 6 *Scott, N. R.* 607), a number of letters which had been written subsequent to the publication of the libel, were admitted as evidence of malice on the part of the defendant ; and I do not know how we can confine the principle there established, that malice may be shown by events occurring subsequent to the publication of the libel, without allowing events which have occurred prior thereto to be evidence of pre-existing rancour or malice in the mind of the alleged libeller. A patient, christian-minded man may endure a great deal, without resorting to the law for redress ; but continued and persevering insult may at last arouse him ; and, if, at the eleventh hour, he says, " I have borne these repeated attacks on my reputation, and I must at length seek redress and endeavour to arrest the progress of these reiterated calumnies," is it not reasonable, when human endurance is thus at length aroused, that the party com-

plaining should be permitted to show, that it was not a casual word, a single libellous publication, a hasty unpremeditated observation, that had urged him to take the step of seeking redress at law for the continuing attacks on his character? It occurs to me, that principles such as these should guide a Court of Justice as to the rule to be adopted in admitting evidence of this nature—always, however, bearing in mind, that the evidence either of earlier or subsequent publications, should have a reference to the matter of the libel, for which the plaintiff, by his action, seeks redress. The principles laid down by Lord Ellenborough in the case of *Rustall v. Macaulster* (1 Camp., 49, n.), referred to by Tindal, C. J., in *Pearson v. Lemaitre*, go strongly to fortify the opinion, that prior publications may be given in evidence to establish malice: in that case actionable words spoken by the defendant afterwards, were offered in evidence in an action of slander, and Lord Ellenborough is reported to have said, “ You cannot give, in evidence, special damages not laid in the declaration, but you may give in evidence any words, as well as any acts of the defendant, to show *quo animo* he spoke the words which are the subject of the action.” It is also to be observed, whether under the late statute, the defendant having obtained the privilege of putting the question of ‘ *actual malice* ’ specifically in issue, a greater latitude may not thus be given to the plaintiff as to the production of evidence, which expressly goes to negative the plea put in by the defendant, and the admissibility of what might have been questionable before the enactment of that statute. Again too, there is another issue raised upon this record by the statutable plea, viz., that the publication was inserted in the newspaper without “ gross negligence; ” so that, supposing the case of malice doubtful, yet on this second issue are not such prior publications, flowing from the same editor, published in the same newspaper, and covering a period of so many years, all relating to the same individual, admissible evidence of gross negligence on the part of the defendant?

It only remains for me now to say, in reference to the last objection taken to the admissibility of this evidence, that I am clearly of opinion that all the publications spread upon this record are referrible to the libellous matter complained of by the plaintiff. They all contain defamatory matter, reflecting on the character of the plaintiff, either in his capacity as a Juryman, or in reference to his trade and calling as a coachmaker. These are the two points of libellous defamation by which the plaintiff alleges his character is aspersed: and without going through the passages in the several publications (I believe eight in number), I do not hesitate in giving my opinion, that they all (in different degrees, no doubt) relate to the libellous matter which is the subject matter of this action.

On the forgoing grounds, I, therefore, am of opinion that the second exception should be overruled, and judgment given for the plaintiff.

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With respect to the first exception on the record, I concur with my Lord Chief Justice, that it ought to be overruled. The 180th section of the Municipal Act (3 & 4 Vic. c. 108) creates an exception and disqualification from serving on Juries, with respect to certain persons therein described, but without specifying the means by which parties desirous of availing themselves of such exemption or disqualification (as the case may be), are to attain their objects. Again, the 20th section of the Jury Act (3 & 4 W. 4, c. 91) exempts Special Jurors from challenge upon any of the grounds mentioned in that section. Now, as I understand the argument of the defendant's Counsel, it is this:—"True it is, that there are certain disqualifications specified in the Jury Act, and that the 20th section has dealt with those only, and is silent as to all others;—admitted also, that the disqualification of a Town Councillor from serving on Juries within his borough did not exist at the time of the passing of the Jury Act, and was created by a subsequent statute; still, as by that statute no means are provided for giving effect to such disqualification, the legislation is incomplete; and in order to carry out the intentions of the Legislature, we are called on to construe the two statutes together,—they being, in this respect, *in pari materia*." Now, if this be done, the 20th section of the Jury Act will be read thus:—"Any man who shall not be qualified according to this Act, or the *Municipal Act*, shall be discharged upon challenge, provided always that nothing herein contained shall extend to any Special Juror." That was the argument of the Counsel for the defendant, as I understood it; and, for some time it appeared to me to be well founded,—the more especially on taking into account the principle of construction laid down in *Vernon's case*, as relied on at the bar; but, on subsequent consideration I was led to form a different opinion. If the 20th section of the Jury Act, instead of being confined in its operation to the disqualifications mentioned in that Act, had been applicable to all disqualifications then existing, it appears to me that it might possibly be contended successfully, that the new disqualification now in question, created by a subsequent statute, should, under the circumstances of this case, be held to be governed by the 20th section of the Jury Act; but, in point of fact, there were various disqualifications in existence at the time of the passing of the Jury Act, which are not mentioned therein, and which accordingly are not affected by the 20th section. Then, the difficulty of so construing the two statutes together, as to incorporate the 180th section of the Municipal Act with the 20th section of the Jury Act, is this:—that supposing the disqualification now in question to have been in existence at the time of the passing of the Jury Act,—who can say that the Legislature, which left so many other disqualifications unaffected by the 20th section, would have placed this one within its operation? We may *conjecture*, perhaps, that it would have

done so ; but are we at liberty to construe Acts of Parliament upon *conjecture*, the more especially in a case where, as it now appears to me, the intention of the Legislature can be worked out without resorting to any such incorporation of the two sections as is sought for on the part of the defendant ? For it must be recollected, that by the express enactment of the 25th section of the Jury Act, "all matters whatever relating to "Special Juries shall remain and continue in force as heretofore, except "where the same have been expressly altered by this Act." Now, how stood the law in relation to challenges to Special Juries before the passing of the Jury Act ? It was insisted at the bar, that before that Act no challenge lay to a Special Juror ; but the recital contained in the 17 & 18 G. 3, c. 45, is conclusive as to the law being otherwise. Then, taking it that before the Jury Act challenges lay to Special Jurors, and that *that* Act has not altered the law in this respect (save in the cases therein provided), we account for the omission in the 160th section of the Municipal Act to specify the means whereby the disqualification thereby created can be made available, inasmuch as by law the right of challenge was annexed to the creation of the disqualification, without any enactment for the purpose. For how came the right of challenge to Special Jurors to exist previous to the 17 & 18 G. 3 ? Not by legislative enactment, for none such exists ; but because it was deemed a necessary incident, in point of law, to the existence of disqualification in a Special Juror, that the parties to the action should have the right to avail themselves of the objection by the ancient and established practice of challenge.

Nor is it to be forgotten, in the consideration of this question, that the right of challenge is one extremely beneficial to the parties in a suit, and in the maintenance of which the public are deeply interested. The provisions of the 20th section of the Jury Act are a restriction, and a serious one, on the undoubted privilege of the suitor to secure an unexceptionable tribunal for the trial of his rights, by challenging Special Jurors in open Court and before the Judges of the land, and with the benefit of an appeal to a higher jurisdiction if dissatisfied with their decision ; instead of being bound to submit, without appeal, to the judgment of the officer who strikes the Special Jury. It does appear to me, that under such circumstances, we are called on to require from the defendant, who insists that by the operation of these two statutes the parties have been deprived of the right of challenge in reference to the disqualification in question, a very clear case, indeed, to establish his position. Such a case has not, in my judgment, been made out ; and therefore, I am of opinion, that the first exception must be overruled.

The second exception raises a very important question. It has been ruled, in the case *Pearson v. Lemaitre*, that subsequent publications may be given in evidence in an action of libel, to show *quo animo* it was

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published ; and if such be the law, we have to consider whether there is any distinction in principle between prior and subsequent publications in this respect. In my judgment there is none. It may be doubted, perhaps, whether prior publications do not in their nature furnish a more satisfactory criterion whereby to determine the *animus* with which the publisher of an alleged libel has been actuated, than subsequent publications can be deemed to afford ; because where a malicious feeling is discoverable in a prior publication, it would appear a less violent conclusion to infer its continuance down to the time of the publication complained of,—than to pronounce that it *then* had existence, because it was apparent at a subsequent period. Accordingly, if we are without authority on the subject, I should say, that on principle, prior publications are admissible in evidence for the same purpose as subsequent ones have been held to be so ; and with respect to the hardship upon a defendant to be obliged to come to trial prepared to explain or defend, perhaps, a long series of prior publications, which may have taken place (as in the present instance) several years before the libel complained of,—it may be observed, that the same thing may happen (though with more limitation in point of time) in the case of subsequent publications ; and I apprehend that in neither case can the principle of the admissibility of the evidence be affected by that consideration.

I abstain from adverting to the plea filed under the late Act of Parliament, relying on the absence of actual malice or gross negligence in respect of the publication complained of. This, and many other topics, have been noticed by my Brethren on the Bench, and it is unnecessary for me to dwell upon them ; but I may say that, in my opinion, the admissibility of the evidence objected to is more apparent when considered in reference to this plea.

On these grounds, I am of opinion, that the second exception should also be overruled.

JACKSON, J.

Two questions have been raised for our consideration on this bill of exceptions—one of them being of very extensive application in all descriptions of actions ; and the other, a question on the admissibility of a certain class of evidence, extremely important in actions of libel. These questions, I may also add, are not only very important, but likewise new, and now brought under the consideration of a Court of Law for the first time.

The first question raised on the record is, whether a challenge to a Special Juror can be taken when he comes to be sworn ? A disqualification has been created by the 180th section of the Municipal Act, which declares, that every member of the Town Council for the time being of a borough, and others therein named, shall be exempt and disqualified

from serving on *any* Jury summoned within such borough, save and except the Juries summoned for an assize or jail delivery.

I agree with my Lord Chief Justice, that it forms no part of our duty, as Judges, to give reasons for the several enactments which the Legislature have thought proper to make from time to time; but he has suggested some reasons for the particular enactment in question, which seem to me to be well founded. It may also have been considered by the Legislature, when passing the Municipal Act, that the great changes introduced by that statute were likely to produce, in the several boroughs, so much strife and contention at the yearly elections of the officers and members of the Corporations, that the fruits thereof would be, in all probability the production of so much animosity, on the one hand, or partiality, on the other, as to incapacitate men from the due discharge of their duties as Jurors; and it may likewise have been considered, that in extensive communities, like that of the city of Dublin, no inconvenience would arise from disqualifying some persons from acting as Special Jurors. We are not bound, however, to find a reason for what the Legislature has thought proper to do; it is sufficient that they have said, that a Town Councillor is disqualified from serving on a Jury summoned within his borough, except where the Jury has been summoned on an assize or jail delivery; and the Jury, in this instance, having been empanelled before my Lord Chief Justice, on what was neither an assize nor a jail delivery, the party objected to as being a Town Councillor, was, by the express terms of the Act, disqualified from serving on it.

Mr. *Henn* has contended, that the enactment in question has reference only to Inferior Courts; but the short answer to that proposition is, that the Legislature has not said that it is to be so confined. It exempts and disqualifies the Town Councillor and others therein named, from serving on *any* Jury within the borough. It thus confers a privilege on the Town Councillor, which he can lay claim to, and it also arms the public with a protection, of which they can avail themselves. It was contended by Sir *Colman O'Loughlen*, in reply to a question put to him by the Court, that a party claiming exemption must do so before the trial, viz., when the Jury is struck before the officer; but such a position would be most unreasonable, as he has no opportunity of claiming his exemption at that time, not being aware of his being on the panel.

But then it was argued, that there could be no such thing as a challenge to a Special Juror. This was answered by my Brother *Torrens*, who referred to the 17 & 18 G. 3, c. 45, s. 9, which expressly recognises the reduction of the Jury by the process of *challenge*; and so does the 28th section of the Jury Act in this country, which supplies the means of forming a proper Jury, if the Special Jury which has been struck should happen to be reduced by *challenge*. It is quite clear, therefore, that a challenge did lie, and will now lie to a Special Juror; and the case of

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The King v. Sullivan, in 1 *Perry & Davison's Reports*, shows that such a challenge did lie subsequent to the corresponding Jury Act in England, which contains provisions almost the same in terms as those contained in the Irish Jury Act. In that case, which was, as I have stated, decided in the year 1838, subsequent to the passing of the English Jury Act (6 G. 4, c. 50), Lord Denman says, "The subject is certainly of great importance, and ought to be considered. At present, my opinion is, that the objection should have been made the subject of *challenge* to "the Juror."

There is another case reported under two different titles, by two separate reporters, viz :—as *The King v. Sutton*, in 8 B. & C.; and as *The King v. Despard* in 2 Man. & Ry.; and it is of importance to notice that it is one and the same case which is thus reported in two different books, because the reports do not agree. One of them refers to the decision of the Court, as being that a Special Juror cannot be challenged for alienage, while the other states the same proposition, with the qualification "*it seems.*" It is hard to say, which of these reports is the more accurate, as they do not correspond; and therefore, neither of them can be relied on as a decision with respect to that point.

It was relied on by the defendant's Counsel, that supposing the objection could have been made, it ought to have been taken before the officer who struck the Jury; but it does not appear to me, that we can so construe the 180th section of the Municipal Act; and, instead of saying that it *must* be taken before the officer, I should say, that it *may* be made at that time. It is the duty of the officer to decide on the validity of the objection, if made before him; and if, on the other hand, it is made when the Juror comes to be sworn, the Court has likewise a duty to perform; and the Chief Justice is to have the question raised put into a proper train for adjudication; which is to be done by challenge, raising an issue on a matter of fact, or an issue in law, as the case may be. I, therefore, concur in opinion with Lord Denman, that the challenge lies; and I think, with my Brother Ball, that it is the right of the subject, not only to make his objection before the officer, but also before the Court, and to have it stated on the record. These are the grounds of my opinion, that the first exception should be overruled.

With regard to the second exception, respecting the admissibility of antecedent publications tendered in evidence by the plaintiff at the trial, and which were received, I agree with the principle of the case of *Pearson v. Lemaitre*, as referred to by my Lord Chief Justice; where it appears to have been acknowledged that, even before Lord Campbell's Act, publications antecedent to the libel complained of were admissible to show *quo animo* it was published; but the effect of Lord Campbell's Act has been to raise two or three more issues theretofore unknown to

the law ; such as gross negligence, and sufficiency of apology : and is it possible to say, that these publications are not evidence to show, at least, gross negligence ? and with respect to the question of malice, what evidence could be more persuasive on that issue, than antecedent publications of a similar character ? They are, in my mind, stronger and better evidence of the *animus* of the defendant, than those published subsequently, and which have been held to be admissible. With respect to the argument founded on the Statute of Limitations, it appears, to me, to be more in favour of the admissibility of these publications in evidence ; because it is not, in such a case, bringing matter to bear against a defendant, which could be the subject of another action. On the whole, therefore, I am of opinion, that the Court ought to overrule both exceptions.

Overrule the exceptions, and let judgment be entered up for the plaintiff.

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SULLIVAN v. LENIHEN.

May 26.

THIS was an action for a libel on the plaintiff published by the defendant in a newspaper, of which he was the editor. The defendant pleaded the general issue, and a special plea of an apology under the 6 & 7 Vic., c. 96, s. 2, and alleged that the apology had been inserted in his newspaper before the commencement of the action. This allegation was afterwards discovered to be incorrect ; and the defendant now came before the Court for liberty to withdraw the said plea, on an affidavit that he would be materially prejudiced and embarrassed by its remaining on the record, and could not have a fair trial on the merits. On the other hand, it was sworn on the part of the plaintiff, that his replication was prepared and ready to be filed, that the proof had been directed previous to the service of the notice of this motion ; and that it would materially prejudice the plaintiff in the maintenance of his action, if the defendant were permitted to withdraw his said plea.

In an action for a libel, the defendant having pleaded the general issue, and the special plea of an apology under the 6 & 7 Vic., c. 96, s. 2, the Court refused to allow him to withdraw the latter plea, the plaintiff having sworn that he would be prejudiced thereby at the trial.

Mr. Napier, Q. C., and Mr. Meagher, for the defendant.—The defendant has a right to withdraw his plea before the replication has been filed, if he undertakes to plead the general issue : *Law v. Law* (a) ; *Waters v. Bovell* (b) ; *Taylor v. Joddrell* (c) : and in the case of *Wilkes*

(a) 2 Sh. 980.

(b) 1 Wils. 223.

(c) 1 Wils. 254.

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v. Wood (a), leave was given to withdraw the general issue and plead a special plea of justification. The general doctrine of the defendant being permitted to withdraw his plea, which is filed for his own benefit, is likewise recognised in *Cox v. Rolt* (b); *Paplief v. Codrington* (c); *Hollingsworth v. Briggs* (d); *East v. Chapman* (e); *Freeman v. Jones* (f). The plaintiff could derive no legal benefit from this plea being retained, as an admission in one plea cannot be taken advantage of on the trial of an issue raised by another.

Mr. Macdonogh, and *Mr. James Dwyer*, for the plaintiff.—The case of *Freeman v. Jones* is an authority for the refusal of this motion, where the plaintiff alleges he would be damnified by the withdrawal of the plea; and the other cases cited were either decided on special circumstances which do not exist in this case, or are in our favour.

DOHERTY, C. J.

This is an application to the discretion of the Court; and could not be granted, under the circumstances of the case, without establishing a dangerous precedent. It appears that two pleas were filed to the plaintiff's declaration; one of them, a plea of the general issue, and the other a special plea of an apology under the recent statute amending the laws relating to libel. This latter very important and deliberate plea, the defendant now seeks to withdraw, after a lapse of three months from the filing of the same, and when the time for directing proofs has arrived—the ground of his application being that the retention of the said plea on the record will be embarrassing to him on a trial. It is easy to foresee that if such application were granted, an advantage might thereby result to one party; and a corresponding disadvantage to the other; and if such may be the case, we are not to deprive the plaintiff of any benefit which he alleges may be derived from the deliberate act of his adversary. The principle announced in all the cases is, that the Court will not interfere to make the alteration here sought on the record, if such alteration may be detrimental to the plaintiff, which, in this case, it has been sworn it would be.

We are, therefore, of opinion that the motion ought to be refused with costs.

Let the motion be refused with costs.

(a) 2 Wils. 204.

(c) 4 Dow. P. C. 494.

(e) 2 C. & P. 570.

(b) 2 Wils. 253.

(d) 4 Dow. P. C. 643.

(f) 2 Wils. 391.

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Common Pleas.

KEARNEY v. POWER.

June 5.

THIS was a writ of inquiry before the Chief Justice of this Court, to assess damages on a bond, the condition of which was, that one Richard Power should pay to James Kearney the rent of certain premises in said bond mentioned, "one half year's rent before the other became due." The plaintiff, at the trial, gave in evidence the bond, which appeared to be conditioned for the payment of £140. 9s. 8d., the amount of the yearly rent of said premises. This bond was impressed with a ten shilling stamp only; and Counsel for the defendant objected that this stamp was insufficient, and that the bond could not be read in evidence. The plaintiff took a verdict subject to the objection.

A ten shilling stamp on a bond for £140. 9s. 8d., conditioned for the payment of one half year's rent of certain premises before the other became due (the half year's rent being £70. 4s. 10d.), is insufficient; and the said bond, with the condition, having been produced by the plaintiff on a writ of inquiry to assess damages, the verdict for the plaintiff was set aside, and a new inquiry directed.

Mr. Hatchell, Q. C., and Mr. Harris, for the defendant.—The plaintiff having set out the condition of the bond, it was necessary that he should, on the trial, produce the bond, with the condition, and identify, and therefore prove the bond itself: *Gainsford v. Griffith* (a); *Edwards v. Stone*, which is referred to in the preceding note to *Gainsford v. Griffith*; *Williams v. Sills* (b); *Hodgkinson v. Marsden* (c); *Roberts v. Marriett* (d). The only question, therefore, is, the sufficiency of the stamp, which, as the sum secured exceeds £100, a ten shilling stamp is insufficient: *Mockler*, 119, 221; *Scott v. Alsop* (e); *Attree v. Anscomb* (f); *Winchester Market-place v. Gillingham* (g).

Mr. David Lynch, and Mr. Ardagh, for the plaintiff.—The bond was rightly stamped, as it was executed for the repayment of one half year's rent (£70. 4s. 10d.), the bond having become forfeited on the omission to pay one half year's rent before the other became due.—[JACKSON, J. But you could proceed to recover on this bond more than half a year's rent.]—The conditioned sum in the bond is the amount of the half year's rent. At all events, the objection, if tenable, comes too late, as the bond is not produced to be proved at the trial, but only to be identified: *Edwards v. Stone*. The objection cannot be made after judgment has been entered on the bond; in like manner as a similar objection to the sufficiency of the stamp on a bill of exchange, cannot be

(a) 1 Saund. 58 f, n. 1.

(b) 2 Camp. 519.

(c) 2 Camp. 121.

(d) 3 Saund. 187, d.

(e) 2 Price, 20.

(f) 2 M. & S. 88.

(g) 4 Ad. & E. N. S. 475.

T. T. 1845. made on an inquiry after judgment by default, or a payment of money
Common Pleas. into Court: *Israel v. Benjamin* (a); *Watson v. Glover* (b); *Anonymous* (c); *Green v. Hearne* (d). The condition alone is to be proved,
 KEARNEY v. and no part of the bond is to be looked at, the bond and condition being
 POWER. separate and distinct instruments.

DOHERTY, C. J.

The bond and condition being on the same paper, and the attestation being at the foot of the condition, and not of the bond, the latter must necessarily have been in evidence on proof of the condition. There can be no question of the insufficiency of the stamp; and the bond having been used as a medium of proof, the inquiry must be set aside, and a new inquiry directed, with the costs of the late inquiry and of the argument; inasmuch as the plaintiff took the verdict at his peril, and the Judge gave no opinion on the point raised.

Let the verdict had for the plaintiff be set aside, and let a new inquiry issue; the plaintiff paying to the defendant the costs of the late inquiry, and the costs of this motion.

(a) 3 Camp. 40.

(b) 7 Jur. 68.

(c) 3 Wils. 155.

(d) 3 T. R. 301.

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Common Pleas.

JOHN CONLAN, Assignee of the Assignees of JAMES BAKER,

v.

The Heir and Tertenants of THOMAS BODKIN.

June 6.

SCIRE FACIAS.—The writ recited the recovery of a judgment for £180 and damages, by James Baker, as of Michaelmas Term, in the fifty-third year of the reign of King George the Third (1812), against Thomas Bodkin—that the said Baker died intestate, and that administration of his goods and chattels was granted on the 29th of July 1825, to Ellen O'Donnell, who afterwards intermarried with Robert White; and afterwards, in Michaelmas Term 1828, it was considered that the said Robert and Ellen should have execution against the said Thomas for the debt and damages aforesaid, according to the force, form, and effect of said recovery. The writ then recited an assignment of said judgment by the said Robert and Ellen to John Conlan, as of Trinity Term 1842, according to the form of the statute, &c.; and that although judgment was thereupon given, and execution awarded in form aforesaid, yet execution remained to be made. The writ then recited the death of Thomas Bodkin, and that he died seized of several lands and tenements, and commanded the Sheriff to make known to the heirs and tenants of the lands, which were of the said Thomas Bodkin, on the day of the rendition of the original judgment (December 21, 1812), to show cause why the debt and damages aforesaid should not be levied off all the lands and tenements which were of and belonged to the said Thomas Bodkin at the time of the rendition of the judgment aforesaid or afterwards, and rendered to the said John Conlan, according to the form of the recovery and statute aforesaid, &c. The writ then stated the return of the Sheriff of the heirs and tenants of the lands of which the said Thomas Bodkin was seized in his demesne as of fee, at the time of the rendition of the said original judgment.

A plea of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40) is no answer to a *scire facias*, in which a judgment obtained more than twenty years before the issuing of the *scire facias*, and an award of execution on the same to the administrator of the conusee against the conuzor, within the twenty years, are set out.

To this *scire facias* James Clarke, one of the said tenants, filed the following pleas:—

First—**Executio non* against him for the debt and damages aforesaid of the lands and tenements in the writ mentioned, because no part of the principal money of the said debt and damages, nor any interest thereon, was paid, nor any acknowledgment of the right thereto given in writing, signed by the said Thomas Bodkin deceased, or by him or his agent, or

* This plea is bad for not stating the commencement of the period of limitation; vide *Fortescue v. M'Kone*, 1 J. & S. 341.

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by any other person or persons by whom the same was payable, or by the agent of any such person, to the said John Conlan, or to the said James Baker, or to any person entitled thereto, or to the agent of the said John Conlan, or of the said James Baker, or of any other person entitled thereto, within twenty years next before the time of the issuing of the said writ of *scire facias*, to wit, &c.; and this he is ready to verify, wherefore he prays judgment, &c.

Second—*Executio non* of the said lands and tenements, because a present right to receive the same debt and damages accrued to a person capable of giving a discharge for and a release for the same, to wit, to the said James Baker, more than twenty years before the suing forth said writ, to wit, on the 21st day of December 1812, to wit, at, &c.; and that no part of the principal money of the said debt and damages in the said writ mentioned, nor any interest thereon, was paid, nor any acknowledgment of the right thereto given in writing, signed by the said Thomas Bodkin deceased, or by his agent, or by any other person or persons by whom the said debt and damages was payable, or by the agent of any such person or persons, to the said James Baker, or to his agent, or to the said John Conlan, or to his agent, or to any person entitled thereto, or to the agent of any such person, within twenty years next before the time of the issuing of the said writ of *scire facias*; and this he is ready to verify, &c.

Third—Non-seizin of the said Thomas Bodkin, of the said lands, at the time of the rendition of the said judgment of Michaelmas Term 1812, in the said writ mentioned, or at any time after.

To the first and second of these pleas, the plaintiff replied, *precludi non*, because that after the recovery of the said judgment, and the said writ of *scire facias* first mentioned, and within twenty years next before the time of the issuing of the said writ of *scire facias*, to wit, in Trinity Term 1828, at, &c., a certain other writ of *scire facias* to revive the said judgment, was duly issued out of, &c., and such proceedings were had and taken upon the said last mentioned writ of *scire facias*, that it was afterwards, to wit, in Michaelmas Term 1828, by the said Court, &c., considered, as in the said first mentioned writ of *scire facias* is set forth, that the said Robert and Ellen, in the said first mentioned writ of *scire facias*, should have execution against the said Thomas Bodkin, for the debt and damages aforesaid, according to the force, form, and effect of the said first mentioned recovery, &c., as by the said last mentioned writ of *scire facias* and the said judgment thereon remaining of record in the said Court, may more fully appear. And the said John Conlan further avers, that the said judgment whereby it was in Michaelmas Term 1828, considered that the said Robert and Ellen should have execution, &c., as set forth in the said writ of *scire facias* in this replication first aforesaid, was, and is, the same judgment had upon the said writ of *scire facias* in the replication

secondly aforesaid, whereby it was in Michaelmas Term 1828, by the said Court, &c., considered as aforesaid, that the said Robert and Ellen should have execution against the said Thomas, for the debts and damages aforesaid, and not another and different judgment; and this he is ready to verify, &c.

To the third plea, the plaintiff replied the seizin of the conuzor after the time of the rendition of the judgment of Michaelmas Term 1812, concluding to the country.

To the replication to the first and second pleas, the defendant rejoined *executio non*, because that the said Thomas Bodkin was not at the time of the rendition of the said judgment of Michaelmas Term 1828, or at any time afterwards, seized in his demesne as of fee, &c., of and in any of the said lands and tenements in the return to the said writ of *scire facias* mentioned; concluding with a verification and prayer for judgment.

To these rejoinders the plaintiff demurred, and assigned as causes, that the said rejoinder did not fortify the matter by the said defendant pleaded in bar, nor did it support the same, but alleged new matter contrary to the said pleas, and was a departure therefrom, and not consistent therewith. And also, for that the said rejoinders and matters therein alleged, contained no answer to the said replication. The defendant joined in demurrer.

Mr. Christian and Mr. O'Donnell, with whom was Mr. Moore, Q. C.—
The pleas of the Statute of Limitations are no answer to the *scire facias*, as appears from the cases of *Farran v. Ottiwell* (a) and *Farrell v. Gleeson* (b), decided by the House of Lords. The decision in those cases was, that a "new right" was conferred by the judgment of revivor, and that the only circumstance which prevented the success of the plaintiff in recovering his claim in that case, was the technical point of departure in pleading. It is not necessary, in this case, to argue the effect of a judgment in *scire facias* between the parties to the original judgment, the judgment in *scire facias* being, as in the case of *Farran v. Ottiwell*, at the suit of the executors of the original conusee; and therefore, the circumstances of the two cases are analogous in all material particulars, with the exception, that we have avoided the vice in pleading which was fatal in the case of *Farran v. Ottiwell*, by setting out the judgment of revivor in the *scire facias*. The pleas are the same in both cases, and in the case of *Farran v. Ottiwell* it was a complete answer to the *scire facias*; but in this case it is not, inasmuch as the *scire facias* shows that within twenty years, a right accrued to the plaintiff to receive the judgment debt. It is insisted on the other side, that the *scire facias* sets up two rights instead of a single one, and that we rely on both; but

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(a) 5 Ir. Law Rep. 487.

(b) *Vide post*, p. 477.

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it is not so, for the right claimed by us is the single right to receive the debt secured by the original judgment of 1812; and the fallacy of their argument is, that the subject matter of our claim is given to us by the judgment of revivor, whereas the judgment of revivor is only a relative term, and refers to, and gives us nothing but a "new right" to receive the original judgment. It is, not a judgment, but an award of execution—*Philips v. Mangles* (a)—and gives a new right, not to something in the judgment of revivor itself, but to the fruits of the original judgment: *Executors of Wright v. Nutt* (b). It is, in fact, the title deed, but not the thing to which it gives title; and is no more what it gives, than the title deed is the estate which is conveyed and secured by it. The new right it confers is in the same priority over other incumbrances affecting the estate as the original judgment, otherwise the bill in the case of *Farrell v. Gleeson* must have been dismissed, the judgment of revivor being, as in this case, subsequent to the title of the defendant who pleaded. If the judgment of revivor in that case had been a new judgment, altogether irrespective of the original judgment, the House of Lords would not have rested their decision on the technical grounds of a departure in pleading; but the claim in the replication was not for a new and different thing altogether, but was a claim on a new title to the same thing as that claimed in the declaration: *Stewart v. Cottingham* (c). In this case, the two judgments, viz., the original judgment of 1812, and the judgment of revivor of 1828, taken together, form one title, and give us the right we claim; and to that claim, on that title, the plea of the Statute of Limitations is no answer.

Mr. Keon and Mr. Tomb, Q. C., *contra*.—This case is substantially the same as that of *Farran v. Ottiwell*, in which the House of Lords overruled the judgment of the Exchequer Chamber in this country, which was founded on the arguments urged by the other side. The judgment of the House of Lords was founded on the principle that the judgment of revivor conferred a "new right," and that therefore, the plaintiff having, in that case, relied in his *scire facias* in the original judgment, and in the replication on the judgment of revivor, there was a departure in pleading. In this case, the plaintiff, instead of replying the judgment of revivor, sets it out in the *scire facias*; but prays execution on the original judgment, because it is the only judgment which could affect us. He, therefore, relies on the present right to receive the amount of the judgment debt which accrued in 1812, and not, as he ought to have done, on that which accrued in 1828, and is, therefore, barred by the Statute of Limitations. Had execution been prayed on the judgment of revivor of 1828, our lands

(a) 11 East, 516.

(b) 1 T. R. 388.

(c) 6 Ir. Eq. Rep. 266.

could not have been affected, inasmuch as it is admitted on the record, that the conusor was not seized of the lands of which we are returned tertenant, at the time such new right was acquired, or at any time after. If the argument on the other side were correct, there would have been no departure in pleading in the case of *Farran v. Ottiwell*. It is now settled that the effect of the judgment of revivor is not to draw down the original judgment, or Tindal, C. J., would, as he has observed in his judgment (p. 492), have been incorrect in his statement, that it gave a new right.—[TORRENS, J. Undoubtedly, the judgment of the English Judges went to contravene that position of the Irish Bench.]—Then, if the original judgment is not drawn down to the date of the judgment of revivor, it is clearly barred by the statute. The plaintiff ought to have declared on the judgment of revivor.—[BALL, J. If you were to proceed on the judgment of revivor, how could you pray execution on it, irrespective of the original judgment, when it is a judgment to recover according to the form and effect of the recovery of the original judgment ?]—The same difficulty must have occurred in the case of *O'Brien v. Ram* (a), where the husband could only have been liable on the judgment in *scire facias*, and not on the original judgment. That the plaintiff is remediless as far as concerns the original judgment of 1812, is plain from the observations of Tindal, C. J., in his judgment in *Farran v. Ottiwell*, in answer to the argument founded on the hardship of the case as respected the plaintiff, where he says—“No hardship follows, except upon those who have slept on their rights, in the entire disregard of the provisions of a public Act of the Legislature.” It is argued on the other side, that the case of *Farrell v. Gleeson*, decided by the House of Lords, subsequent to that of *Farran v. Ottiwell*, has overruled or modified the decision in that case ; but so far from that, it confirms it, because it proceeds on the express principle laid down by the Lord Chancellor in *Farran v. Ottiwell*, that the judgment in *scire facias* conferred a “new right ;” and it is absurd to contend that a party can have two present rights to receive the same debt ; or that the tertenant who pleads in this case, and who was neither a party to, nor in privity with any person summoned in the *scire facias* of 1828, is bound by that judgment, or can be affected by it.

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This case has been brought before the Court on a demurrer taken by the plaintiff to the rejoinder of the defendant ; and the question which has been raised thereby for our determination, is substantially the same as that on which the Court of Exchequer Chamber in this country pronounced all but unanimous judgments in the case of *Farran v.*

(a) 3 Mod. 187 ; S. C. Carth. 30.

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Ottiwell (a). For the defendant, it has been suggested, that the judgment in that case was brought under the consideration of the House of Lords on an appeal; and that it is at least a matter of doubt, whether the opinion of the majority of the Judges in this country has been sustained by the judgment of the House of Lords on that appeal. In reply, the Counsel for the plaintiff has produced a report of the judgment pronounced in the House of Lords in the case of *Farrell v. Gleeson* by Lord Cottenham, who in the course of his judgment says, "This point arose in a case in this House, and was the subject of a question put to the Judges during the last Session (I mean the case of *Farran v. Ottiwell*). In that case, the judgment was of the year 1810; and the plaintiff having died, his representative revived the suit by *scire facias* in 1817; and the Judges gave their opinion, that the judgment in *scire facias* conferred on the plaintiff a new right, within the 3 & 4 W. 4, c. 27, s. 40. And although the case was disposed of upon a question of defect in pleading, the noble and learned Lords who attended the hearing of that cause, concurred in the opinion of the Judges: the Lord Chancellor said, 'I agree with her Majesty's Judges, in thinking, that in this case, a new right was acquired by the judgment in *scire facias* in 1817.' I entirely concur in the opinion expressed in that case, and think that it ought to decide the present." With this opinion of my Lord Cottenham I entirely concur; and after that clear and explicit announcement of what was the decision of the House of Lords in the case of *Farran v. Ottiwell*, no lawyer could say that the decision turned on any thing but a defect in pleading. The defendant's Counsel attempted to distinguish the case of *Farrell v. Gleeson* from that now before the Court; but they have failed in doing so; and the pleadings being differently framed, they are free from the defect in the case of *Farran v. Ottiwell*. Consequently, this case must be governed by the principle laid down by the Judges in the Exchequer Chamber in Ireland, and which has never been overruled. The demurrer, therefore, must be allowed, and judgment entered up for the plaintiff.

TORRENS, J.

In this case, I concur in opinion with my Lord Chief Justice; and I also agree with him in the reasons which he has assigned in delivering his judgment. The question which has been discussed in this case ceases to be a question of principle, and is confined to one of pleading alone. The principle decided in the case of *Farran v. Ottiwell*, in the Exchequer Chamber, has been confirmed by the decision of the House of Lords in the case of *Farrell v. Gleeson*, which has explained to the Profession that the grounds on which the House of Lords differed from the great

majority of the Irish Judges, were distinctly of a strictly technical nature; and it is a satisfactory reflection that the principle which the Irish Judges endeavoured to enforce, being one of the utmost importance as affecting securities in this country, was adopted by the legal judgments of the English Judges, and confirmed by the House of Lords. They have only differed from the decision of the Irish Exchequer Chamber on the form of pleading. But it may still be a question, whether or not the form which has been adopted by the plaintiff in this case, is the correct mode of pleading. A new right has been conferred by the judgment of revivor, and we are now to decide whether the plaintiff has entitled himself to the fruits of that right by the pleading he has adopted in this case. My Lord Chief Justice has fully stated the reasons given by Lord Cottenham, in his judgment in the case of *Farrell v. Gleeson*; but there is something further in the case, in what occurred when the Counsel pressed their Lordships on the question of costs, to show the grounds of their decision. Lord Cottenham, on that occasion, observed:—"The question BETWEEN THE PARTIES may be, whether they agreed to be bound by the decision in *Farran v. Ottiwell*, or not; but whether they agreed or not, *Farran v. Ottiwell* having been decided, and the very same question arising in both cases, this House, of course, would pronounce the same judgment in both. It is quite immaterial, therefore, whether they (the parties) agreed to be bound by this decision in *Farran v. Ottiwell*, or not." It is therefore, as I said, a satisfactory reflection that our judgment in the case of *Farran v. Ottiwell*, in this country, is necessarily the same as that of the English Judges, and the House of Lords, on the principal question; and still more, that the inconvenience and danger which, in the opinion of the majority of the Judges, was likely to arise to securities in this country, has been obviated.

Our judgment is, therefore, as I have said, to be given on the pleading in the case before us; and the validity of that must depend on the plea of the defendant; because if that be vicious, the remainder of the pleading becomes immaterial. The plaintiff, therefore, has fallen back on the plea, and combated its soundness. Now, the House of Lords decided that a pleading of a different nature, in *Farran v. Ottiwell*, would have established the plaintiff's right to recover, inasmuch as that right was established, under the statute, by the judgment of revivor. In the case at bar, the original judgment, together with the revival of it in the year 1828, is set out in the *scire facias*. But it was contended by Counsel for the defendant, that this mode of pleading was equally erroneous as that adopted in *Farran v. Ottiwell* (a); and it was put to the Counsel to state what form of pleading would be proper, if this were not sufficient to bring the admitted right to recover the amount of the original judgment

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(a) 6 Law Rec. N. S. 10.

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into activity and vitality. In reply, it was stated, that the plaintiff ought to have declared on the judgment of *scire facias* alone. Looking, however, into the cases on the subject, it is plain that the judgment of *scire facias* is not such as could be declared upon, or on which, as a simple judgment of revivor, an execution could issue. The plaintiff here has set out the original judgment, and has stated substantially the revival of 1828 in this *scire facias*; and thus, combining the interest which he had in the original judgment, with the right to receive the same under the judgment of revivor, he has framed a pleading which does not militate with principle, and is not, in our opinion, open to any technical objection. The pleas, therefore, of the defendant, cannot be sustained; and this will be a sufficient ground for deciding this case, without discussing the other grounds of objection—and which decision is consistent, on the main question, with the reasoning of the Irish Judges, the decision of the Judges in England, and the judgment of Lord Cottenham in the case of *Farrell v. Gleeson*.

For these reasons, I am of opinion that the judgment of this Court should be for the plaintiff.

BALL, J.

I concur in the judgment of the Court as pronounced by my Lord Chief Justice; but I must say, that had it not been for the decision of the House of Lords in the case of *Farrell v. Gleeson*, I should have had some difficulty in holding that the Judges of England, by the judgment which they pronounced in the case of *Farran v. Ottiwell*, intended to convey that a “new right” was to be understood as conferring a new term of twenty years. There are passages in the judgment of Tindal, C. J., as reported, which appear to me to import that such was not their meaning, and which, in that respect, seem to conflict with the opinion of the majority of the Judges in this country as to the meaning and extent of the term “new right.” However, the late case of *Farrell v. Gleeson*, and the judgment pronounced by Lord Cottenham in that case, has removed all doubt upon the subject; his Lordship holding that the effect of a judgment of revivor is to give a new term of twenty years for the recovery of the amount of the original judgment; and further intimating that such was the meaning of the English Judges, as laid down by Tindal, C. J., in the case of *Farran v. Ottiwell*. Under these circumstances, whatever may have been the language attributed to Tindal, C. J., in the printed report, we are bound by the unequivocal decision of the House of Lords in *Farrell v. Gleeson*, and which decision is precisely consonant to that of the great majority of the Judges in this country in the case of *Farran v. Ottiwell*.

I am of opinion, therefore, that the plaintiff in this case is entitled to judgment.

JACKSON, J.

I am also of opinion, that the plaintiff is entitled to judgment in this case. The main question for our decision is the same as that in the case of *Farran v. Ottiwell*, decided in the Exchequer Chamber in Ireland; but as I was not one of the Judges who decided that case, I may, perhaps, be excused for making a few observations on the subject. The *scire facias* here states the original judgment, and then it goes on to state the judgment of revivor, and prays execution of the original judgment on behalf of the new party to the judgment of revivor. To that *scire facias*, a plea of the late Statute of Limitations has been put in; to which the plaintiff has filed a replication, going more at large into the proceedings of the revivor in 1828, but not thereby departing from his declaration, because he relies on the same judgment as was stated in the *scire facias*. To that replication the defendant has rejoined; and to that rejoinder the plaintiff has demurred. Such being the state of the pleadings, according to the well known and established right of the parties, the plaintiff, instead of resting his case on the invalidity of the rejoinder, has fallen back on his adversary's plea, and insists that the plea is no answer to the declaration in *scire facias*. In this position, I think that the plaintiff is well founded, because the *scire facias* discloses a right which has accrued within twenty years.

I take this opportunity of stating, that I concur fully in the judgment pronounced by the Court of Exchequer Chamber in this country in the case of *Farran v. Ottiwell* as to the main question, which was, whether the statutable limitation of twenty years was to be reckoned from the original judgment, or the judgment of revivor. I concur in the opinion then expressed by the great majority of the Judges of that day, that the twenty years are to be counted from the judgment of revivor, and not from the original judgment. With respect to that case, I am also of opinion, that the judgment was not reversed on the appeal to the House of Lords on the main question; on the contrary, it received confirmation, as I conceive, by establishing the proposition that a new right was conferred by the judgment of revivor, in whatever sense that "new right" was to be understood. That case of *Farran v. Ottiwell* was also referred to in the later case of *Farrell v. Gleeson*, where it is clear that Lord Cottenham has considered that the decision of the House of Lords in *Farran v. Ottiwell* was, that a new right had been conferred by the judgment of revivor, and that the twenty years began to run from that date. The decision in that case of *Farran v. Ottiwell* was on the question of pleading alone; and although there are some passages in Chief Justice Tindal's judgment, which it is not easy to reconcile (and we are not called on to reconcile them), yet his opinion on the main question is plain enough. He says, "Whether these cases may be distinguished from the ordinary case of a writ of *scire facias* merely to

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"revive a judgment, and an award of execution thereon where there is
 "no change of parties, it is unnecessary to determine. It may be the
 "case, that where a new right is conferred by the judgment in *scire facias*,
 "as in the present instance" (and as in the case now before this Court),
 "the money sought to be recovered may fairly be considered to have been
 "secured to the plaintiffs below by that judgment, within the true mean-
 "ing of the 40th section of 3 & 4 W. 4, c. 27. But we are not called
 "upon to express an opinion upon that point, upon the present state of
 "this record: for the replication is bad as being a departure, and the
 "original claim on the judgment of 1810 is, as we think, barred by the
 "statute." Thus Chief Justice Tindal, while intimating his opinion on
 this question, guards himself, and shows that the opinion of the Judges of
 England went entirely on the question of pleading. And the Lord
 Chancellor, in the same case, says:—"I agree with her Majesty's Judges
 "in thinking, that in this case a *new right* was acquired by the judgment
 "in *scire facias* of 1817; but the plaintiffs below having declared on the
 "judgment of 1810, and the plea under the statute of the 3 & 4 W. 4,
 "c. 27, being, as I think, a sufficient answer to the claim, as stated in
 "the declaration, the plaintiffs below could not set up, by way of repli-
 "cation, a new right in answer to the plea." So that the House of Lords,
 following the opinion of the Judges in England, decided the case of
Farran v. Ottiwell on the question of departure in pleading, and on that
 alone; and if, in this case, the plaintiff had framed his *scire facias* as it
 was framed in *Farran v. Ottiwell*, the plea pleaded would have been an
 answer to it. He has not, however, done so; but he has embodied the
 original judgment and judgment of revivor in his *scire facias*; and I do
 not understand how he could have pleaded otherwise than in this form.
 We called on the learned Counsel for the defendant to suggest any other
 form, and no answer was given by him; and therefore, as no objection
 was taken to the *scire facias*, the pleading of the plaintiff stands good,
 and he is entitled to judgment on this record.

Allow the demurrer.

NOTE.—If a replication, or a rejoinder (as the case may be), does not contain mat-
 ter which was *antecedent* to, or in confirmation and maintenance of the title on which
 the pleader had relied in his declaration or plea, but is supplementary to the previous
 pleading, in containing matter which was *subsequent* to the title set forth in the said
 declaration or plea, the pleading is open to the objection of a departure. Thus, where
 a defendant pleaded in bar a feoffment of A. B., and the plaintiff replied that A. B. dis-
 seized him, and then enfeoffed the defendant, upon whom he re-entered; and the defend-
 ant rejoined that the plaintiff, after the disseizin, confirmed the estate of A. B. before his
 feoffment, it was held to be no departure, "because the confirmation was made *before*
 "the feoffment, and so it fortifies the bar; but if he had pleaded by the rejoinder a con-
 "firmation made by the plaintiff to himself, such rejoinder had been a departure,
 "because it came after the feoffment pleaded in bar:" *Plowd. Com.* 105; *Year Book*,

Mich., 6 Hen. 7, 8, a. The same principle is laid down in *Doct. Plac.* 119, and in *Co. Litt.* 304, a. So in the case of *Fulmerston v. Steward* (Plowd. 102; Dyer, 103, pl. 2); which was an action of trespass, in which the defendant made title to the premises, pleading a demise for fifty years, made by the college of Rushworth on the 20th of December, in the thirtieth year of King Henry the Eighth. The plaintiff replied that there was a prior lease of the same premises for sixty years, which had been assigned to the defendant, and which was unexpired at the time of making the said lease for fifty years; and alleged a proviso in the Act of 31 Hen. 8, c. 13, which avoided all leases by the colleges to which that Act relates, if another lease for years at the making thereof was in being, and undetermined. The defendant, in his rejoinder, pleaded another proviso in the same statute, which validated such leases for twenty-one years from the making thereof, if made to the same person, &c.; and averred, that by virtue of the said proviso and Act, the said lease pleaded by him in bar was available in him for twenty-one years from the time of making it, and which twenty-one years were not then passed. On a demurrer to this rejoinder, the Judges held that it was a departure from the plea—observing, that “in the bar he pleads on a lease for fifty years, and in the rejoinder, he concludes upon a lease for twenty-one years, &c. And the defendant *might have shown the statute, and the whole matter at first*, wherefore he shall not be aided now by the said branch of the statute.” And after the observations cited above, with respect to the allegation of antecedent matter not making a rejoinder a departure, the Judges add:—“So here, the Act of Parliament came *after* the lease, which he might have pleaded in bar: and therefore it is a departure by the opinion of the whole Court.”

Now, in the case of *Farrell v. Gleeson*, the House of Lords gave relief on the original judgment; and therefore, they construed the “new right,” which was stated to have accrued by the judgment of revivor to the plaintiff, in the case of *Farran v. Ottiwell*, not to have been a new right irrespective or independent of the original judgment. The House of Lords must, therefore, be taken to have decided in *Farran v. Ottiwell*, that the replication was a departure, not on the ground that the judgment of revivor set forth a new right independent and irrespective of the original judgment, but on the ground, that the judgment of revivor, which was the subject matter of the replication, was *subsequent* to the original judgment, which was the title on which the plaintiff relied in the *scire facias*; and which, therefore, might, and ought to, have been set out in the *scire facias*, on the principle laid down in the foregoing case of *Fulmerston v. Steward*—viz., *that the whole matter might have been shown at first*.

If these observations are well founded, the mode of pleading adopted by the plaintiff in the foregoing case of *Conlan v. Bodkin*, would seem to be correct, without interfering with the observations of Tindal, C. J., or the decision of the House of Lords, in the case of *Farran v. Ottiwell*; and who must, therefore, be taken to have concurred in the general proposition laid down by the majority of the Judges in the Court of Exchequer Chamber in this country, that a judgment of revivor within twenty years, is sufficient to prevent the original judgment being barred by the 3 & 4 W. 4, c. 27, s. 40—at all events, where there has been a change of parties.

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1844.
H. of Lords.

In the House of Lords.

FARRELL, *Appellant,*

v.

GLEESON, Executrix of GLEESON, *Respondent.*

September 5.

A judgment was obtained in 1813, and revived by *scire facias* at the suit of the executor of the co-nusee against the heir and tertenants of the co-nusor in 1829. A bill was filed in 1838 in the Court of Exchequer in Ireland, against the representatives of the real and personal estate of the debtor, praying for an account, and payment of the principal and interest due on the judgment, out of the debtor's personal or real estate. *Held*, that a plea of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40), by a defendant claiming part of the real estate under a settlement bearing date subsequent to the original judgment, but prior to the judgment of revivor, was no bar to the suit.

THIS was an appeal from the Court of Equity Exchequer in Ireland, to the House of Lords. The bill was filed on the 18th of April 1838, by the respondent, in the Court of Equity Exchequer in Ireland, against the appellant and others, praying (amongst other things) that an account might be taken of the sum due to the complainant as executrix as aforesaid, for principal, interest, and costs of proceedings on foot of the judgment therein mentioned to have been obtained by the said John Gleeson, deceased, against Michael Keane, deceased; and that if the personal estate of said Michael Keane should be found insufficient to satisfy the said sum to be found due to the complainants, then that a sale might be had of the lands in the bill mentioned, for payment of the said amount, and of other charges and incumbrances.

The bill stated, that John Gleeson (the respondent's testator) obtained a judgment against Michael Keane in Trinity Term 1813, for £199. 19s. 10d. penalty; that previous to the intermarriage of Jane Keane, one of the daughters of said Michael Keane, with the appellant, certain articles of agreement were entered into and executed, bearing date the 5th day of April 1821, whereby, after reciting the said intended marriage, the said Michael Keane covenanted with appellant to execute such deed or deeds as Counsel should direct, for conveying and assuring to the trustee of said marriage settlement, the several lands and premises therein mentioned, upon the trusts therein mentioned, and subject thereto, to the sole and only use of the appellant, his heirs and assigns for ever.

The bill then stated, that the said Michael Keane died on the 14th of March 1825, seized of real estate in Ireland; and that John Gleeson died on the 9th of March 1828, having made his will and appointed the respondent and others his executors; that the said executors in Michaelmas Term 1829 caused said judgment to be revived against the heirs and tertenants of Michael Keane, and issued an *elegit* thereon, directed to the Sheriff, and procured a finding thereon; but the said proceedings had no result; and on the 18th of June 1833, duly redocketed said judgment; and that the whole principal sum and interest thereon from 1816 was due on said judgment.

The appellant pleaded the Statute of Limitations in manner following :—" That the said complainant's bill was filed after the 20th day of " July, in the year 1833, that is to say, on the 18th of April 1838, and " that a present right to receive the debt and damages secured by the said " judgment in said bill of complaint mentioned to have been acknow- " ledged by the said Michael Keane to John Gleeson, in bill named, " accrued to the said John Gleeson in his lifetime ; and that the said John " Gleeson was then capable of giving a discharge for, and a release of the " same, and that such present right so accrued to the said John Gleeson, " he being then so capable of giving such discharge and release, as " aforesaid, more than twenty years before the filing of the complainant's " bill in that suit, that was to say, on the 1st day of November 1816 ; " and that no part of the principal money of the said debt and damages, " nor any interest thereon, was paid, nor any acknowledgment of the " right thereto giving in writing, signed by the said Michael Keane, his " heir or devisee, or by his agent, or the agent of any of them, or by any " other person or persons by whom the said debt and damages were pay- " able, or the agent of such person or persons, or any of them, to the " said John Gleeson, or to the said Mary Gleeson and Edward Kennedy, " or to any or either of them, or to their agent, or to the agent of any " or either of them, or to any person entitled thereto, or to the agent of " any such person, within twenty years next before the time of filing the " said bill of the said complainants in that suit ; all which matters and " things appellant did aver to be true, and was ready and willing to " maintain and prove, as the Court should award ; and he did plead the " same, and the Act in such case made and provided, entitled ' An Act " ' for the Limitation of actions and suits relating to real property, and " ' for simplifying the remedies for trying the rights thereto in bar,' to so " much of said bill as aforesaid ; and did humbly demand the judgment " of the Court, whether appellant ought to be compelled to make any " further or other answer to so much of the said bill of complaint afore- " said ; and your appellant disclaimed all right, title, or interest in, or to, " the personal estate and effects of the said Michael Keane, or any part " thereof." The appellant also put in an answer to the bill. The said plea was overruled by the Court with costs, without hearing any argument, on the ground that the construction and operation of the late Statute of Limitations had, since the filing of the plea, been decided by a majority of the Judges in the Court of Error in the case of *Farran, in error, v. Ottiwell* (a). The respondent then compelled the defendant to put in an answer, to which she replied ; and the cause having been heard, the Court decreed an account of the personal and real estate according to the prayer of the bill. There were two appeals, the first against the order overruling the plea, and the second against the decree.

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(a) 2 Ir. Law Rep. 110.

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The *Attorney-General* and Mr. *Campbell*, for the appellant.

The *Solicitor-General* and Mr. *Bethell*, for the respondent.

Lord COTTENHAM.

In 1813, John Gleeson obtained a judgment in the Court of Exchequer in Ireland, against Michael Keane. In 1821, Michael Keane executed a settlement, under which the appellant claims interest in land, of which Michael Keane was seized at the time of the judgment. In 1825, Michael Keane died, and under his will Sarah Keane is his sole devisee and legatee, and became his personal representative. In 1828, John Gleeson died, and the respondent is his personal representative. In 1829, the respondent obtained a judgment of *scire facias* reviving the judgment of 1813 against Sarah Keane and the tertenants of the lands of which John Keane was seized at the time of the judgment of 1813, and sued out an *elegit*, and brought ejectments which were not available.

In 1838, a bill was filed by the representatives of John Gleeson, for payment of the judgment debt out of the personal and real estate of Michael Keane. To this bill the appellant put in a plea of the Statute of Limitations, which was overruled, and forms the subject of the first appeal,—as to which it does not seem necessary to say anything more, than that it was clearly overruled by the answer; and the question upon the Statute of Limitations having been raised by the answer, and decided at the hearing, forms the subject matter of the second appeal.

The appellant, after the plea had been overruled, put in his answer, but did not appear at the hearing; and as I collect from the papers, a decree *nisi* was taken, and made absolute upon no cause shown: against this decree, so made, the appellant has appealed. Being of opinion that the decree was right upon the merits, it is not necessary for me to make any observations upon an appeal being brought to this House by a party who, by the course he pursued, purposely abstained from taking the opinion of the Court below upon the point raised by the appeal, and submitted to a decree *nisi* being made absolute against him, without showing cause upon the point insisted upon before this House.

The appellant relies upon the 40th section of 3 & 4 W. 4, c. 27, which enacts, that no action or suit shall be brought to recover any sum of money secured by any judgment, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge, or a release, of the same.

The respondent meets this defence, by saying, that, by the judgment in *scire facias* in 1829, it was adjudged that she, the respondent, should have execution against the tertenants for the debt and damages aforesaid, to be levied off the lands and tenements aforesaid; and insists, that

by this judgment a present right accrued to her to receive the debt in question, and that her bill was filed within twenty years from that time.

This point arose in a case in this House, and was the subject of a question put to the Judges during the last Session, I mean the case of *Farran v. Ottiwell*. In that case, the judgment was of the year 1810; the plaintiff having died, his representative revived the suit by *scire facias* in 1817; and the Judges gave their opinion, that the judgment in *scire facias* conferred on the plaintiffs a new right within the 3 & 4 W. 4, c. 27, s. 40; and although the case was disposed of upon a question of defect in pleading, the noble and learned lords who attended the hearing of that cause, concurred in the opinion of the Judges; the Lord Chancellor said, "I agree with her Majesty's Judges in thinking, that in this case a new right was acquired by the judgment in *scire facias* in 1817."

I entirely concur in the opinion expressed in that case, and think that it ought to decide the present; I, therefore, move, your Lordships, that the decree be affirmed with costs.

Mr. Stephens (agent for the appellant).—Perhaps your Lordships will forgive me for saying, that in this case your Lordships' attention has been drawn to the fact, that notice was given that the appellant would be bound by the decision in *Farran v. Ottiwell*, which was then pending in your Lordships' House; but that was declined on the part of the respondent, and the money was paid into the Court below. The notice is upon the face of the papers, if your Lordships consider that as a reason why no costs should be allowed.

Lord COTTENHAM.—The question between the parties may be, whether they agreed to be bound by the decision in *Farran v. Ottiwell* or not; but whether they agreed to it or not, *Farran v. Ottiwell* having been decided, and the very same question arising in both cases, this House, of course, would pronounce the same judgment in both; it is quite immaterial, therefore, whether they agreed to be bound by the decision in *Farran v. Ottiwell* or not. The effect of the judgment is, to affirm the decree below, which is in conformity with the decision in this House in *Farran v. Ottiwell*.

Ordered and adjudged that both the appeals be dismissed, and that the order and decree thereon respectively complained of be affirmed; and also, that the appellant do pay to the respondent her costs in both appeals.

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Queen's Bench.

JASPER ROGERS

v.

CAROLINE DEJONCOURT and two others.*

(*Queen's Bench.*)

Jan. 22, 24.

Where a landlord, entitled to a rent makes a distress, and dies without appointing an executor, neither a detainer of that distress, nor an original distress made by a party, can be justified in an avowry by that party subsequently taking out administration before the avowry.

REPLEVIN.—The declaration averred the taking to have been on the 14th of February 1844.

There were two avowries and cognizances; the avowries by the defendant Caroline, as administratrix with the will annexed of Stephen Dejoncourt deceased, and the cognizances by the other defendants as her bailiffs. The first avowry and cognizance avow and acknowledge the taking, &c., "because the plaintiff for three years previous to the 29th of September 1843, and from thence until the death of Stephen Dejoncourt, held "the *locus in quo* as tenant to the said Stephen, under a demise for a "term still subsisting, at the yearly rent of £55. 10s., payable half "yearly; and because in the lifetime of the said Stephen, on the 19th of "April 1842, one and-a-half year's rent continued due, the said Stephen "on that day took one parcel of the goods in the declaration mentioned; and because the said one and one-half year's rent continued "unpaid until and on the day of the death of the said Stephen, he "thence continually until and on the day of his death detained that "parcel of the goods with the assent and at the request of the plaintiff as "a distress; and because in the lifetime of the said Stephen another half "year's rent, on the 15th of November 1842, was unpaid to the said "Stephen, he on that day took another parcel of the said goods; and "because the last-mentioned rent continued unpaid until and on the death "of the said Stephen, he thence continually until and on the day of his "death detained, with the assent and at the request of the plaintiff, the "last-mentioned parcel of goods as a distress," &c.

It then set out two subsequent distresses of the remainder of the goods by Stephen in his lifetime, for subsequent arrears; and similar detainers by him until his death.

It then stated that "the said Stephen died on the 12th of February "1844, having made his will; and that after his death, to wit, *on that day and year*, administration with the will annexed was granted to the "defendant Caroline; and because the said several sums continued "unpaid, until and on the day of the death of the said Stephen, to him, "and at the time when, &c., continued unpaid to the said Caroline as "administratrix, and because the plaintiff continued in possession of the

* *Coram* CRAMPTON, J., and FERRIN, J.

"*locus in quo* from the day of the death of Stephen until the time when, &c., she as administratrix, and the other defendants as her bailiffs, continually from the day of the death of the said Stephen, until and at the time when, &c., detained the goods," &c.; and it concluded with profert of the letters of administration.

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The second avowry and cognizance was the common avowry by an administratrix for rent in arrear, stating the death of the intestate and the taking to have been on the same day. There were several pleas put in to these avowries.

The fifth plea to the first avowry and cognizance traversed the detaining of the goods by the said Stephen in his lifetime, with the assent and at the request of the plaintiff, *modo et formâ*.

The sixth plea to the first, and the fifth plea to the second avowry and cognizance, were the same; they cravedoyer of the letters of administration, and setting them out with their dates, stated that the defendants took the goods on the 14th of February 1844, and that administration was not granted to the defendant Caroline until the 27th of February 1844; that the plaintiff had brought his action for the taking of the goods on the 14th of February 1844, and detaining them from that day, and averred that from the day of the death of the said Stephen, until the day on which administration was granted, the goods were not liable to be taken or detained by the defendant Caroline as administratrix.

To each of these pleas the defendants demurred specially.—Joinder in demurrer.—There were several other pleas, upon which issues in fact were joined.

Mr. Francis A. Fitzgerald (with whom was Mr. Napier), in support of the demurrers.

As to the fifth plea to the first avowry, it is multifarious: the avowry states three distinct detainers at distinct periods of time, and at distinct requests, and the plea attempts to put all in issue upon this traverse. Cumulative traverses are allowed only when the several facts put in issue are involved in one proposition, which is in effect the matter traversed: *Robinson v. Raley* (a).

The demurrer to the sixth plea to the first avowry, and fifth plea to the second avowry, raises two questions—first, whether an administrator may, after administration granted, avow for the detention of goods under distress by his testator, in the interval between the death of the testator and the grant of administration; secondly, whether an administrator may, after administration granted, avow for a distress made by himself in the interval between the death of the testator and the grant of administration.

These pleas are bad, as they contain no material or traversable allegation; but though the pleas are bad, the questions may be raised

(a) 1 Burr. 316.

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on general demurrer to the first avowry. As to the first question, the distress being impounded by the testator, was in the custody of the law, and the re-taking of the goods by the owner, after such a taking, would be a pound breach: *Six Carpenters' case* (a); *Gilbert on Distress*, 88, 181. The only way in which, after impounding, the owner could regain possession, was by replevin or assent of the party distraining; even tender of the rent, after impounding, would be no bar to the action of pound breach, nor could it be pleaded in bar to an avowry: *Always v. Broome* (b); so that the circumstance that in the interval between the death of the intestate and the grant of administration there was no person to give a valid release for the rent, is not material, because a tender, after impounding, is too late, the goods being in the custody of the law. The rent in arrear vested in the administratrix by relation from the time of the death of the intestate, and therefore was in her in the interval between the grant of administration and the death of the testator. The custody of the law must, therefore, in that interval have been a custody for the benefit of the administratrix, and an act of law which she has a right to adopt by her avowry: *Com. Dig. Administration*, B. 10; *Thorpe v. Stallwood* (c); *Foster v. Bates* (d). That case decides that an administrator may adopt an act of an agent of the intestate in the interval between the death and the grant of administration, though the agent did not know who would take out administration. There the administrator might have treated the agent's act as tortious; but here the case is much stronger in our favour, for the act adopted is the act of law—*quæ nemini facit injuriam*.

As to the second question, it may be admitted that a party has no authority to distrain before administration granted, and therefore a rescue of the distress before impounding would be lawful; and also, that a subsequent grant of administration to the distrainer, would not make the rescue unlawful by relation, that being the very case to which the doctrine of relation does not extend; but after the impounding of the distress, the authority of the distrainer may be made good by relation; for after impounding, though by a distrainer without authority, the owner can only obtain his goods by replevying: *Anonymous* (e); *Cotsworth v. Bettison* (f). In the same way, the grant of administration to the distrainer, before avowry, establishes his authority by relation at the time of the distress, because it vests in him by relation, at that time, the rent in respect of which the distress was made: 1 *Saund.* 265: and this is strictly in accordance with the doctrine generally laid down—viz., that all acts of an executor *de son tort*, if he subsequently takes out administration, are made good: *Com Dig.*

(a) 8 Rep. 147.

(c) 6 Sc. N. C. 715.

(e) 1 Anderson, 31.

(b) 2 Lutw. 1262.

(d) 12 M. & W. 226.

(f) 1 Salk. 247.

Administrator, C. 3; Doe d. Patten v. Patten (a). It was there held that in an ejectment by an administrator, the demise may be laid on the day before the grant of letters of administration.

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Mr. Hobart, and Mr. Pigot, contra.—We do not rely on the pleas, but we contend the avowries are bad on general demurrer. The case of *Thorpe v. Stallwood*, relied on by the other side, was merely an application of the old authorities, as to the position laid down in 1 *Wms. Errors*. 493, that an administrator could maintain trover as well as trespass in such cases; and the reason is, if it were otherwise, there would be no remedy for the wrong done; and the case of *Foster v. Bates* only applied the doctrine of waiving the *sort* and bringing *assumpsit*.

We are entitled to assume that every detention amounted to an original taking of the goods. The principal question then is, can a party distrain before administration has been granted to him? *Keane v. Doe (b)* is an *à fortiori* case against the doctrine. In that case the right to distrain existed at common law, the interest of the landlord in the premises being a term of years, vested in the administrator of the intestate, incident to distress. There was a general avowry in that case, and the question arose on the evidence, and it is more strongly in our favour, because the right does not arise here at common law; and *Prescot v. Boucher (c)* shows, that under the statute the executors had not that right. In *Gill. Dist. 2*, it is said, that at common law the non-payment of the rent would be a forfeiture of the feud, and the reversion belonged to the owner of the fee when he died; therefore, the administrator could not distrain, not being owner, nor could the executor for the same reason. Then came the 10 *Car. 1*, stat. 2, c. 5, which provides that the personal representatives of tenants in fee, &c., may distrain for arrears due in the lifetime of the testator. The right to distrain only existing under the statute, the defendant not being administrator at the time the distress was made, does not come within its terms, therefore the doctrine of relation does not apply; for he cannot say that because the grant gave the right, that therefore he has a parliamentary authority. The right to distrain is not incident to the rent either by statute or common law, but the statute made it incident to the character of executor or administrator. The Act gives the same right to sue as to distrain, and if relation applied in one case, it applies also in the other; therefore, if he has a right to distrain he could maintain an action of debt, yet the action of debt could not be sustained before administration granted. *Barefoot v. Barefoot (d)* decides, that if a man releases a debt, and afterwards take out letters of administration, it will not bar him, for the right was not in

(a) 11. & N. 493.

(c) 3 B. & Ad. 849.

(b) 11. & N. 496.

(d) Palm. 411.

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him at the time of the release; and this case has been followed by *Whitehall v. Squire* (a) and *Doe d. Hornby v. Glenn* (b).—[PERRIN, J. There is a case reported before Joy, C. B., *Lyons v. Mulderry* (c), in which it was held, that a person who improperly disposes of goods of an intestate, and afterwards takes out administration, may then maintain trover for their recovery. The report of that case is inaccurate, because it states that more of the property was taken away by the defendant than had been sold by him to the intestate.]—In *Woolley v. Clarke* (d), Lord Tenterden says “There is a manifest distinction between “the case of an administrator and an executor: an administrator derives “his title wholly from the Ecclesiastical Court. He has none until the “letters of administration are granted, and the property of the deceased “vests in him only from the time of the grant.” This is analogous with the cases on the Statute of Limitations: *Murray v. East India Company* (e): it was there held in an action by an administrator upon a bill of exchange payable to the testator, but accepted after his death, that the Statute of Limitations begins to run from the time of granting letters of administration, and not from the time the bill became due, there being no cause of action until there is a party capable of suing: *Pratt v. Swaine* (f).

Great inconvenience would arise from the doctrine contended for—distress is a *festinum remedium*, it is a substitution for a suit; how is it possible to determine the right of the distrainer? If he was executor he may, for he can show the will, but if there be no administration, if the tenant pay the rent how is he to be relieved from a subsequent administration, for the distrainer may abandon the first proceeding? The administration may be postponed indefinitely, and the tenant must either leave the goods with the distrainer, or replevy them with a certainty of being defeated if another party takes out administration. It is said that the landlord is obliged to sell within fifteen days, but they state in their avowry that the tenant assented to the continuance of the distress: *Winterbourne v. Morgan* (g).—[CRAMPTON, J. Are we called on to decide this question?]—The avowry is for a distress in the lifetime of the testator, and if you hold that the administrator was entitled to distrain, there will be no limit to the relation, and the administrator will be entitled to hold the goods longer than the intestate could; in *Dwyer v. Peacock* (h), it was assumed that he should sell in fifteen days. The avowry is founded on the admission that every detention amounts to a taking.

Mr. Napier, in reply.—The fifth plea to the first avowry tenders an

(a) 1 Salk. 296.

(c) Hayes, 534.

(e) 5 B. & Al. 204.

(g) 11 East, 394.

(b) 1 A. & E. 49.

(d) 5 B. & Al. 745.

(f) 8 B. & C. 285.

(h) 2 Fox & S. 34.

immaterial issue, and the traverse is too large. The plaintiff was tenant of the premises when the distress was made, and the rent in arrear is vested in his administratrix from the time of the death of the intestate. The 3 & 4 Vic. c. 105, s. 61, gives the administratrix the right to recover; and the taking here being alleged to be by the defendant as administratrix, that section puts lessor, executor, and administrator on the same footing, as to recovery of arrears of rent. At the time of the lessor's death the goods were impounded on the premises. The 15 G. 2, c. 8, s. 6, enables lessors to sell distresses on the premises, in like manner as persons taking distress for rent may do, off the premises; and the 25 G. 2, c. 13, s. 5, specifies the time within which distresses may be sold. Even under the English Acts, goods might be detained a reasonable time: *Pitt v. Shew* (a); and therefore, if the goods had been wrongfully detained by Stephen Dejoncourt, that would not defeat the right of the administratrix to detain the same goods (which were on the premises) for rent due to her as administratrix. But even if that issue was material, the traverse is too large, for it puts the whole in issue. It appears all his goods were impounded at the time of Stephen Dejoncourt's death, as a distress for rent due to him, and the opportunity for a tender of the rent had been lapsed at that time: *Firth v. Purvis* (b). The goods were in *custodiâ legis*, for the benefit of the person who would be appointed personal representative.

The sixth plea, however, raises an important question on the doctrine of relation. The second avowry and cognizance is the common one; by that plea it appears that the letters of administration were granted on the 27th of February 1844, and the taking of the goods was on the 14th of February. But the day of the taking is not material, though it were not laid under a *videlicet*: 2 Chitt. Plead. 843, note d, 5th ed. It is not averred the defendant was not administratrix at the time of the taking; and the second avowry relies on the taking by C. Dejoncourt as administratrix. The only objection to our avowry would be a repugnance in dates; but that is only matter of special demurrer: *Ring v. Roxborough* (d). The sixth plea to the first avowry, and the fifth plea to the second, do not, therefore, raise the question of relation.

But, suppose it to be raised, and that it so appears on the record, that a distress is made on behalf of an estate of Stephen Dejoncourt, afterwards administration is taken out by C. Dejoncourt, who adopts the distress; then replevin is brought, and the bailiffs, therefore, justify, and the administratrix avows. We say the law of relation emphatically applies; any stranger may distrain; and it is not necessary that at the time of the distress he had authority for so doing, if afterwards his acts be adopted: *Hull Pickersgill* (e). The authority need not be shown

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(a) 4 B. & Ald. 208.

(b) 5 T. R. 432.

(c) 2 C. & J. 418.

(d) 3 B. Moo. 620.

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until replevin is brought. With regard to an executor, the case has arisen : *Whitehead v. Taylor* (a). The administratrix was entitled to the rent, and to the remedy by distress under the statute, and the bailiffs were at liberty to distrain for the benefit of those who adopted their act and avowed : *Vaughan v. Browne* (b); *Buller's Nisi Prius*, 143; *Com. Dig.* tit. *Administrator*, letter C. 3, (vol. 1, p. 493). "The administration granted will legitimate all intermediate acts, and justify a 'retainer.'" The administrator may affirm or disaffirm the acts of the bailiff, and the adoption by him can only be made after he is administrator : *Poster v. Bates* (c). In *Keene v. Doe* the letters of administration were not got until after issue joined : *Pratt v. Swaine* (d). The statute puts executor and administrator on the same footing, and the cases on the other side are not law. *Massy v. Demberry* (e) turned on the question of notice. All the authorities are discussed in *Thorpe v. Stallwood* (f). The case of an ejectment differs; that is a proceeding in Court, which a distress is not : *Curtis v. Vernon* (g).

CRAMPTON, J.

Entertaining, as we do, no difficulty as to this case, we think it expedient to dispose of it now. I need not notice the pleas, they are abandoned by the party who should support them; the question, therefore, arises upon the avowries and cognizances; and must be considered as if there had been a general demurrer to them; and my impression is, that the avowries are bad on general demurrer.

Two questions have been raised in the argument; first, as to the time when the title by administration arose to the defendant, and secondly, as to the effect of that title by relation to the time of the intestate's death. It was contended that, upon the avowries there is no interval of time between the death of the intestate and the grant of administration, because in the avowries that grant to the defendant and the death of the intestate are laid upon the same day; but taking it to be so, the administration must have been after the death of the intestate, and it signifies not whether the interval was more or less than a day, for the purpose of the argument. But again, the defendant is not bound by the day stated in the avowry, and it is rather strong to bind the plaintiff by that date, and to presume against the law of the Ecclesiastical Court, that the administration was taken out the day of the intestate's death, since we know that no administration can be taken out until fourteen days after his death. In the interval, therefore, which

(a) 2 P. & D. 367.

(b) Andr. 328.

(c) 12 M. & W. 233

(d) 8 B. & C. 287.

(e) See on this case 9 Vin. 133.

(f) 6 Sc. N. R. 715.

(g) 3 Term Rep. 59.

must have occurred, what right had the defendant to take or detain the plaintiff's goods? It is said, that during that interval, the goods were in the custody of the law; that, however, is not the statement of the first avowry; the statement is, that they had been distrained, and that they remained in the detention of the landlord, by compact with the tenant: they were, therefore, under detention at the death of the landlord, and so remained under the defendant's detainer. The first avowry justifies the whole taking, specially setting out what it was, viz., a taking by the intestate, and a continuation of that taking by the administrator, and then acknowledges the whole; therefore the doctrine of relation must arise, as there was and must have been a period between the death of the intestate and the taking of administration. We must take it, upon the first avowry that the distress was made, and the defendant's detainer made before the letters of administration were taken out; and that being so, the question arises, whether the proceeding can be justified under the circumstances? Has a person a right to detain a distress after the death of a party, and afterwards justify that detainer by taking out administration to that party to whom the rent was due before the time of the distress? I apprehend, the case is clear against such a distress; and that without overruling *Keane v. Dee*, or *Patten v. Patten*, we cannot decide for the defendant. The executor derives title from the will, the administrator has no title until administration has been taken out, and that is the reason why the executor may distrain before probate, for the probate is only evidence of his title, but the administrator cannot distrain before administration, because the letters of administration are not merely proof of, but constitute his title.

But it is said that that title has relation back to the death of the intestate; partly it has, partly it has not. For the benefit of the estate it has; the whole property vests in the administrator from the moment of the death of the intestate, and he, therefore, can bring trespass or trover, or *assumpsit* for it, when he obtains administration. It is said, however, that although he cannot institute proceedings in a Court of law until administration, yet his other acts, such as a distress, will be legalized by his subsequent administration. I apprehend that is going too far. The doctrine of relation in this respect will be satisfied by allowing an authority in the administrator, before administration taken out, to do all acts which he can legally do, for the purpose of collecting and preserving the property of the intestate, but not to warrant his doing any acts which he had not at the time title to do. The case referred to in 12 M. & W. 226, was an action of *assumpsit* by an administrator commenced *after* his legal title had accrued; that was a case coming within the doctrine of relation, for the moment he took out administration, the property was his from the time of the death of the intestate, and he was, therefore, entitled to maintain *assumpsit*. And so, also, in the case of

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a retainer, no doubt, an executor *de son tort* cannot retain, but an administrator can. I was struck by the distinction taken by the Chief Justice, in *Patten v. Patten*: he says, that letters of administration will operate by relation to enable the administrator to recover a chattel property from the time of the death of the intestate, yet it does not effectuate a legal proceeding. Is a distress a legal proceeding? Is it not in the nature of a commencement of a suit? The defendant is the actor, because the first step is taken by him; he makes the distress, which may be considered the commencement of the action, but he has no right to distrain by anticipation. He may get a title, but that will not make the act which was tortious legal. It is said that, an entire stranger may go on the land and make a distress, and afterwards look for some person who has title, in whose name to make cognizance, and that then he is justified for all he has done before: but that is because the other party had title at the time the distress was made. He may make the distress in the name of the party having title, and the law will presume that he had authority at the time the distress was so made.

Now, what is the case upon the second avowry?—[The learned Judge read the avowry.]—If the statement be, that the administrator made the distress after the grant of the letters of administration, the avowry is well; but if the statement be understood to be, that the distress preceded the administration, the avowry is bad. Now, from the statement that the intestate died on the 12th of February, that administration was granted on the 12th of February, and that the distress was made by the defendant on the same day, we are called on to presume that the administration preceded the distress. But, that presumption we cannot make for the defendant. He should have shown that he had a title to distrain, by showing that he had the character of administrator before he made the distress. This he has not shown.

The two avowries, therefore, stand on the same footing, and both, I think, are bad.

PERRIN, J.

I think upon the present pleadings the taking must be assumed to have been before the letters of administration were granted; it appears so from the first avowry. Upon the second avowry there is some mystification, it does not so distinctly appear, but at all events it is not shown that it was after the letters of administration granted. It states that the testator made his will, and then states that letters of administration were granted, and it is not shown that the taking was after administration; then the inference is that it was before, and therefore, the question is, whether it is the law of the land, that when a person chooses to say I am entitled to administration, he may distrain, and until the question of his right is settled, the property is to remain in his possession; because if entitled to

distrain—that is, to take by anticipation in execution, another may do so too, waiting until the matter is settled. It appears to me monstrous to suppose, that a man should be permitted to take the property of another, upon the allegation that he owes rent, before he shows title or can give a discharge, and before he can sell the distress. I would be slow to hold that doctrine unless it were shown to be clear law. It would be a very dangerous doctrine in this country. I do not find any authority for it. *Kean v. Des* goes far to show he cannot; but I should require authority on the other side to satisfy me that so extraordinary a proposition was the law. The case of a bailiff does not furnish an analogy, because he professes to act in the name of the person having existing title, and on the authority of the person who could give receipt for rent; and I am not disposed to extend the doctrine that furnishes farther.

Upon these grounds, my opinion is that these avowries cannot be sustained.

Judgment for the plaintiff.

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Nov. 4.

(*Eschequer of Pleas.*)

A motion to extend the time for making up a bill of exceptions, must be upon notice.

MR. HAYES moved to extend the time for making up the bill of exceptions, which had been taken on the trial of this case, at the Sittings after last Trinity Term.

Per Curiam.

This motion must be upon notice.

No rule.

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G. BROWNE, J. MALLEY, J. BOURKE, J. PADDEN,
 T. PHIBBIN and J. HIGGINS.

Nov. 6.

A Sheriff seizing and selling under a *fi. fa.*, more than sufficient to satisfy the amount of the execution, does not thereby render himself liable to an action of *trespass*.

TRESPASS.—The first count of the declaration stated that the defendants, on the 1st of September 1841, and on divers other days, broke and entered a certain house of the plaintiff, situate at Killalla in the county of Mayo, made a noise and disturbance therein, and stayed and continued there for the space of ten days; that they seized and took divers goods

Trespass against a Sheriff and others for breaking and entering plaintiff's house, and seizing and converting his goods; the defendants justified under a *fi. fa.*; to which the plaintiff replied that the defendants, "of their own wrong, seized and took the goods and chattels in the introductory part of that plea mentioned, to a greater extent and much more than was necessary for the purpose in that plea mentioned, in manner and form as the plaintiff had in and by his declaration complained against them the said defendants;" *Held*, on demurrer, that the replication was bad, a Sheriff not being liable in *trespass* for an excessive seizure.

The plaintiff having fallen back upon the defendants' plea as defective, for omitting to aver that one of the defendants had done any act, or in any way participated in the seizure or sale of the goods, and that the plea was therefore bad as not amounting to a confession by all the defendants of the charges contained in the declaration; *Held*, that the plea was cured by pleading over, the plaintiff having, by his replication, admitted that all the defendants had joined in the seizure of the goods.

and chattels of the plaintiff there found and being in the said house, of the value of £1000, and carried away the same, and converted and disposed thereof to their own use. The second count was for an *asportavit* of the goods and chattels.

To this declaration the defendants pleaded first, the general issue; secondly, as to the breaking and entering the said house in the said first count mentioned, and making a noise and disturbance, and staying and continuing therein; and there seizing and taking the said goods and chattels of the plaintiff, in the first count mentioned, and converting and disposing of the same to their own use; and also, as to the seizing and taking of the said goods and chattels of the plaintiff in the last count of the declaration mentioned, and converting and disposing thereof to their own use, *actio non*, because they say, that before the said time, when and soforth, to wit, on the 12th day of June A. D. 1841, one Samuel Croker sued and prosecuted out of the Court of the Exchequer, at the Queen's Courts, Dublin, a *feri facias*, directed to the Sheriff of the county of Mayo, commanding said Sheriff, that of the goods and chattels of John Phibbin and the present plaintiff, he should cause to be made the sum of £365. 0s. 6d., which the said Samuel Croker had recovered against them in the said Court of Exchequer, which said writ duly marked, "afterwards, and "upon the return thereof, to wit, on the 25th day of August A. D. 1841, "to wit, at Killalla, in the county aforesaid, was delivered to the said "defendant John Bourke, who then and there was Under-sheriff of and "acting for and on behalf of the said defendant Geoffrey Browne, which "said defendant Geoffrey Browne, then and from thence until, and at and "after the return of the said writ, was Sheriff of the said county of Mayo, "by virtue of which said writ the said defendant Geoffrey Browne, so "being Sheriff of the said county of Mayo," made his warrant directed to the defendants John Padden and Thomas Phibbin, his bailiffs, commanding them of the goods and chattels of the said John Phibbin and the plaintiff, they should cause to be made the said sum of £365. 0s. 6d.: that said warrant was afterwards delivered to them by defendant James Malley, the assistant and servant of the Sheriff, and by his command; by virtue whereof the defendants John Padden and Thomas Phibbin, peaceably and quietly entered the said house, the outer door being then open, in order to seize and take, and did then and there seize and take the said goods and chattels in the introductory part of the plea mentioned, for the purpose of levying the sum so marked at foot of the said writ, as by said writ and warrant commanded; and in so doing necessarily made a little noise and disturbance, and continued therein so doing for the space of time in the first count mentioned, doing no unnecessary damage to the plaintiff; and afterwards, that defendant James Higgins, as servant of the said Sheriff and by his command, sold and disposed of the said goods and chattels for the purpose of levying said sum of £365. 0s. 6d., and by such

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sale thereof the said Sheriff made and levied the said sum, towards satisfaction of the damages, costs and expenses aforesaid, as it was lawful for him to do. Verification.

Similiter to first plea. Replication to the second plea, *precludi non*. "Because he saith that the said defendants, at the said time, when and "soforth, of their own wrong, seized and took the said goods and chattels "in the introductory part of that plea mentioned, to a greater extent, and "much more than was necessary for the purpose in that plea mentioned, "in manner and form as the said plaintiff hath in and by his said declaration complained against them the said defendants; and this he the said "plaintiff is ready to verify, wherefore," &c.

To this replication the defendants demurred, assigning the following special causes of demurrer:—That the replication to the second plea of the defendants, pleaded in reply to the first count of the declaration, did not support or sustain the said first count, as according to the rules of good pleading it ought to do; and that the replication contained matter not pursuant to the said count, but departed from the same in this, that whereas by the said first count the plaintiff complained against the defendants as if the supposed cause of action in the said count mentioned had been an immediate and direct trespass committed by the defendants to the property of the said plaintiff, with force and arms; yet, in the replication to the defendants' second plea of justification, under a certain writ of *fiery facias*, regularly issued forth of her Majesty's Court of Exchequer, and directed to the defendant Geoffrey Browne, as High Sheriff of the county of Mayo, the plaintiff alleged and relied upon a mere consequential injury to him, arising from the acts of the defendants so justified as aforesaid, and thereby developed in his replication a cause of action variant from that in the count both in substance and form; the ground of complaint, as appearing from the replication, being the subject matter of an action of trespass on the case only. And also, that the replication, although it professed to be and contain an answer to the whole of the second plea, did not in truth contain any answer to the said plea, being a justification under the regular process of a Court of competent jurisdiction and of record. And also, that the replication tendered an immaterial issue, and offered for trial a matter which could not determine whether or not the defendants were guilty of the said supposed trespasses mentioned in the first count of the declaration. And that the plaintiff had not in his said replication denied, confessed or avoided the substantial matter in the second plea alleged. And that the replication ought to have concluded to the country, and not with a verification, said replication purporting to be a replication *de injuriâ*.

Mr. *W. D. Ferguson*, in support of the demurrer.—The grounds of demurrer may be reduced to two: First, the replication is pleaded in bar of the plea, instead of by way of new assignment. Second, the replica-

tion is a departure from the count. First, the replication is in confession and avoidance of the defendants' plea of justification *in toto*, and its operation would be to treat the Sheriff as a trespasser *ab initio* (a); but the Sheriff, by seizing too many goods in execution under a *fi. fa.*, if a trespasser at all, is only a trespasser in respect of the excess and not from the beginning. The general principle of parties becoming trespassers *ab initio*, by their subsequent conduct, is stated in the *Six Carpenters' case* (b). The principle of that rule of law, if founded upon any reason, which has been doubted, is upon this: that where the law gives a *general permission* to a *private individual* to do a voluntary act for his own benefit, or that of his employer, so long as he acts within the scope of that license, it will legalise his acts, and contemplate that he was acting by virtue of that permission and in pursuance of it; but the moment he takes occasion, by means of that permission so given him, to commit a trespass, and thus abuse the general license he had, the law withdraws its shield, and leaves his acts from their inception, exposed and unprotected, and repudiates the idea of his having ever acted under the general license or having ever contemplated a legal act.

The Sheriff, on the other hand, acts not under a general license, but a specific command, not under an authority given to him, but under an order peremptorily enforced, and not voluntarily of his own mere motion, but of necessity and by compulsion. In *Garland v. Carlisle* (c), Baron Vaughan says, "The Sheriff acts as a ministerial officer in execution of "the command he receives in the King's name from a Court of Justice, "and which command he is bound to obey. He is not a volunteer "acting from his own free will, or for his own benefit, but imperatively "commanded to execute the King's writ. He is the servant of the law, "and the agent of an overruling necessity." Again, he says (p. 81), the Sheriff "being the servant of the law, stands distinguished from third "persons, who are under no legal obligation to intermeddle with the "property of others, and, therefore, act at their peril."

On the second ground, the replication is a departure from the first count; it does not allege any matter which could sustain or support a count in trespass; in other words, considering the count and replication together, and the matters of the plea confessed, the plaintiff has misconceived his action.

[The COURT here called on the plaintiff's Counsel to support the replication.]

Mr. Walter Bourke, and Mr. Monahan, Q. C., for the plaintiff.—The

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(a) See 7 Ad. & El. 167; 5 B. & C. 485; and 5 Taunt. 198.

(b) 8 Coke, 290, 1st resol.

(c) 2 Cr. & M. 77.

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Sheriff had no right to seize or sell more than was sufficient to satisfy the amount of the execution.—[CHIEF BARON. The writ commands the Sheriff to *seize* the goods and chattels of the debtor, and to make thereout so much as will satisfy the execution, but that does not prohibit or preclude him from seizing more than sufficient for that purpose. If he do not *sell* more than sufficient, in what respect is he a tort-feasor?—He is a wrongdoer for the excess in the seizure, and as such, it is submitted, he is liable as a trespasser.—[PENNEFATHER, B. The writ of *fi. fa.* commands the Sheriff, that of the goods of the debtor he shall cause to be made the amount marked on the execution. The very mandate of the writ, therefore, seems to imply that the Sheriff may *seize* more than sufficient to satisfy the writ, but that he is not unnecessarily to *sell* more than sufficient for that purpose. All the goods and chattels of the debtor are bound by the writ. But even should the Sheriff *sell* more than sufficient, have you any authority to show that he is liable in *trespass* for the excess? I am not now speaking of an action of *trover* or on the case.]

Admitting that the replication cannot be sustained, the plaintiff is at liberty to fall back on the defendants' second plea, which is bad on general demurrer. That purports to be a plea of justification as to all the defendants under the *fi. fa.*; but in order that all should justify, all should admit the charges contained in the declaration. It does not, however, appear by the plea that the defendant John Bourke did any act, or took any part in the seizure or sale of the plaintiff's goods. The plea indeed avers that the writ was delivered to him as Under-sheriff, but it does not allege that he granted the warrant or did any other act under it. As to him, therefore, the plea is bad as not containing a confession of the trespasses; but being bad as to one defendant, it is bad as to all.—[PENNEFATHER, B. I question, very much, whether the plea is bad on general demurrer. It alleges that the writ was delivered to the Sub-sheriff, and then avers that the High Sheriff made the warrant under it. Does not that imply that the Sub-sheriff handed over the writ to the High Sheriff to enable him to make the warrant? And are we not then, on general demurrer, to infer that the Sub-sheriff did some act?—It is not averred in the plea that he did any act.—[PENNEFATHER, B. No, and for that reason the plea might have been bad on special demurrer. But is it not, at all events, cured by pleading over?]

Mr. Napier, for the defendants, in reply.—The plea has been cured by pleading over: *Cocks v. Nash* (a); *Igoe v. O'Hara* (b).

Secondly—The replication is clearly bad; for where the Sheriff sells under an execution more than sufficient to satisfy the debt and costs, he

(a) 2 M. & Sc. 434.

(b) 1 J. & S. 443.

is liable, not in trespass, but in trover for the excess: *Batchelor v. Vyse* (a). In that case Tindal, C. J., says, "The law allows the Sheriff "to *seize* a reasonable quantity of the debtor's goods, but he must know "when he has *sold* enough to satisfy the execution."

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That quite accords with the view we were disposed to take. This case is very much like that cited from *Moore & Scott*. The defect in the plea consists in its omitting to state that Bourke, the Under-sheriff, seized or took the goods of the plaintiff; but the replication admits that he took the goods, for it says that he, of his own wrong, took them, and to a greater extent than was necessary for the purpose in the plea mentioned. The plaintiff, thus, by his replication construes the plea as if it had averred that the defendant Bourke joined with the other defendants in doing the act. After such a confession on the plaintiff's part, is it competent to him to object to the plea on the ground of the omission of such an averment? We think not; we have no doubt then that the plea has been cured by pleading over, and that the replication is bad; but under the circumstances, we think it right that the plaintiff should have liberty to amend generally, upon the terms of paying the costs of the defendants' pleas and demurrer; also, the costs of this argument, and all the costs to be incurred by the amendment; the defendants to be at liberty to plead *de novo*.

Demurrer allowed.

(a) 4 M. & Sc. 552.

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DOE, Lessee of BOILEAU and others,

v.

CASUAL EJECTOR.

Nov. 10.

In an ejectment at common law for non-payment of rent, where a party could not be served with the summons, the Court deemed a service, by posting on the premises and by service of the summons and declaration on another person, who had the key of the premises, and who stated she was authorised to let or treat for them, good service on that party.

EJECTMENT at common law for non-payment of rent.—The affidavit of the person who served the summons in ejectment, stated that he had called on several occasions at the premises for the recovery of the possession of which this ejectment was brought; that on each occasion he found them locked up; that there was no person there to give him admittance; that there was no dwelling-house on the premises; that they consisted of a large yard, with stables and offices built around and enclosed by a gate; that one Byrne was tenant to or claimed to have some interest in said premises; that he could not find where the said Byrne then was; that he was informed that Byrne had left the country, leaving the said premises wholly unoccupied and untenanted: that deponent, on the 31st of October then last, called at the house of one Margaret Dunn, the mother-in-law of the said Byrne, in the county Dublin, and was informed by her that Byrne and his family used to reside there with her, but had lately left the country; that she refused to tell deponent to what part of the world the said Byrne had gone; that she further informed deponent that she had the key of the said premises, and also had a letter in her possession from the said Byrne authorising her to let or treat about the said premises. The affidavit further stated, that deponent then served her with a true copy of the declaration and summons in ejectment, desiring her to send the same to Byrne; and also posted, on the 1st of November then last, a true copy on the gate of the premises in question.

Mr. *Lewis Morgan* now moved that the service of the declaration and summons in ejectment on Byrne, already had in the manner stated in the affidavit, might be deemed good service. This is an ejectment brought at common law to recover the possession from Byrne, the late tenant, by virtue of a power of re-entry reserved in the lease, and accruing to the lessors of plaintiff by a forfeiture for non-payment of rent. The Courts have power and authority to substitute service of the declaration and summons in ejectment, as well in an ejectment on the title, as for non-payment of rent under the statutes: 2 *Howard's E. P.* 77; *Longfield Eject.* pp. 33, 37, 129; 2 *Fox & Smith*, 55 *note*. It may be objected, that, in a case like the present, where the tenant in possession has absconded, so that no personal service can be effected on him, the

Court will not interfere, but leave the landlord to his common law remedy, by entry and sealing a lease on the premises; but it may be answered, that the Court, acting on the maxim "that no man shall take advantage of his own wrong," will not compel a landlord, seeking to recover possession from his defaulting and absconding tenant, to proceed under the old and dangerous method of entering and sealing a lease on the premises, but will grant an order to substitute service, as in such case the fraud of the tenant suspends the necessity of giving him notice; *Runnington Eject.* 2 ed. 171—more especially where from the mal-practice and fraud of the tenant, by keeping the premises locked up, it cannot be ascertained whether they are *legally* vacant or not: *Doe d. Law v. Roe* (a); *Doe d. Lowe v. Roe* (b); since, if the premises be not *legally* vacant, the judgment had in such an ejectment may afterwards be set aside with costs, as in the case of *Savage v. Dent* (c), recognised in *Doe d. Lowe v. Roe*, *supra*, per Dampier, where lessee of a public house took another, and removed to it his goods and family, but left some beer in the cellar; the rent being in arrear, the landlord sealed a lease, as on a vacant possession, delivered an ejectment and signed judgment, which was afterwards set aside with costs. There are many cases, both in this country and in England, in which a service of the declaration and summons in ejectment on the title, by posting the premises, has, under the circumstances set forth in the affidavits, namely, that the tenant had absconded and could not be found, leaving the premises locked up, been deemed good service on the late tenant in possession: *Doe d. Green v. Ejector* (d); *Doe d. Buckle v. Roe* (e); *Doe d. Farlay v. Roe* (f); *Doe d. Hele v. Roe* (g); also, where from violence offered to the process-server, it became impossible personally to serve the tenants in possession: *John Jack d. Joseph Carey and Henry Rose v. Ejector* (h). The present case is stronger than any of those cited, because we have not only posted the premises, but also delivered a true copy of the declaration and summons in ejectment, to a party having the key of the premises and professing to be authorised by the late tenant to let them.—[BRADY, C. B. There can be no doubt, on the general principle, that the Court has authority to deem the service already had in an ejectment on the title, good service; but is there any reported case, in which a party having the key of the premises for the object of letting them, has been considered an agent of the tenant, so as that service on him was deemed good service on the tenant?]

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(a) 1 Jurist, 240.

(b) 2 Chit. Rep. 177.

(c) Str. 1064; S. C. Buller, N. P.

(d) 2 Fox & Smith, 56.

(e) 1 New Rep. 293.

(f) 1 Chit. Rep. 506.

(g) 2 Chit. Rep. 178.

(h) 2 Fox & Smith, 120.

(i) 6 Bing. N. C. 267. See also *Anon.* Jurist, 950.

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in point—there, the tenant in possession having absconded, leaving the key of the house for which the ejectment was brought, in the hands of a house-broker, in order that he might let the house; the lessor of plaintiff served a declaration in ejectment on the clerk of the house-broker, at his office, and affixed a copy on the door of the premises; the rule for judgment was made absolute in the first instance.

Per Curiam.

On the authority of the last case you are entitled to your order.

It is Ordered by the Court, that service of said ejectment already had on Margaret Dunn, be deemed good service of said ejectment on Luke Byrne, a tenant in possession of, or who claims some right, title or interest, in the premises in said ejectment mentioned, without further motion, serving this Order on said Margaret Dunn, and posting a copy thereof on the entrance gate of said premises.

CRAIG v. BYRNE.

Nov. 7, 15.

Trespass.
Plea, that after the committing of the trespass, and before the exhibiting of the bill, it was agreed between plaintiff and defendant, that the latter should do and perform certain work which was then agreed upon, and furnish materials for the same, for the plaintiff, in satisfaction and discharge of the trespass. Averment, that in pursuance of the agreement, the defendant did and performed the work, and found and provided materials for the same for the plaintiff, and that the plaintiff accepted and received such work and materials in full satisfaction and discharge of the trespass. Demurrer, upon the grounds that neither the nature of the agreement, nor particulars of the work performed had been stated with sufficient certainty. *Held*, that the plea was good; first, because the statement of the agreement was immaterial, and could not have been traversed by the plaintiff; and secondly, that a statement of the particulars of the work would have been objectionable, as falling within the rule prohibiting the introduction into pleadings of matters of evidence.

TRESPASS *quare clausum fregit*. The first count of the declaration was for breaking and entering plaintiff's close and prostrating a party wall, &c. The second count was for an *asportavit*.

The defendant's third plea was as follows:—*Actio non*; "Because, he says, that after the committing of the said several trespasses in said declaration mentioned, and before the exhibiting of the bill of the plaintiff against him, the defendant, in this behalf, to wit, on the first day of October, in the year of our Lord 1841, to wit, at," &c., "it was agreed by and between the plaintiff and the defendant, that the defendant should do and perform certain work which was then agreed upon, and find and furnish materials for the same for the plaintiff, in

"full satisfaction and discharge of the said trespasses in the said declaration mentioned, and of all damages by the plaintiff sustained by reason of the committing thereof. And the defendant avers, that in pursuance of said agreement, he, the defendant, did, at the plaintiff's request, from time to time, after the making of the said agreement, and before the exhibiting of the bill of the plaintiff, against him the defendant, in this behalf, to wit, on the 2nd day of October, in the year of our Lord 1841, and on divers days and times after that day, and before the 1st day of January, in the year of our Lord 1842, do and perform the work aforesaid, and find and provide materials for the same for the plaintiff, which work and materials were of great value, to wit, of the value of £100; and the plaintiff then and there accepted and received such work and materials, to the extent, value and amount aforesaid, in full satisfaction and discharge of the said trespasses in the said declaration mentioned, and of all damages by the plaintiff sustained by reason of the committing thereof. And this the defendant is ready to verify," &c.

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Demurrer, assigning for special causes that the defendant had not set forth or shown in or by his plea any particular work to have been agreed to be performed by him the said defendant; and also, that the defendant had not, in or by his said plea set forth or shown the quantity or value of the materials alleged to have been agreed to be supplied by the said defendant; and also, that the said defendant had not, in or by his said plea set forth or shown any particular work performed by the defendant, and accepted by the plaintiff in such alleged satisfaction; and also, that the defendant had not in or by his said plea set forth or shown the quantity or value of the materials in the said plea alleged to have been supplied and used by the defendant; and also, that the defendant had not in or by his said plea set forth or shown any reasonable satisfaction for the trespasses in the declaration mentioned, and by the said third plea admitted to have been committed by the defendant; and also, that the defendant had set forth the work in that plea alleged to have been agreed on by the plaintiff and defendant, and alleged to have been performed by the said defendant, and accepted in satisfaction by the said plaintiff, in so uncertain and general a manner, that the plaintiff could not know what particular work the defendant would attempt to establish by evidence on the trial in this cause to support the alleged work, and therefore could not be prepared to answer and disprove the same.

Joinder in demurrer.

Mr. Gibbon, for the demurrer.—When the defendant pleads a contract, it should be fully set forth: *Stons v. Bliss (a)*; *Hinton v.*

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Roffzy (a). And in *Hill v. Montagu (b)*, Bayly, J., says:—"I have always understood that the party who pleads a contract must set it out, 'if he be a party to the contract. It lies as much within the knowledge of the defendant as the plaintiff.' So here, the nature of the agreement to which the defendant was a party, and the particulars of the work performed by him in pursuance of it, being matters within his knowledge, ought to have been stated with certainty and precision: *J. Anson v. Stuart (c)*; *Barker v. Thorold (d)*; the last of which cases is precisely in point.

Mr. *Napier*, contra.—First; no greater certainty is required in this plea than would be required in a declaration in *indebitatus assumpsit*, in which this general statement of the work and materials would be sufficient, being matter as much within the knowledge of the plaintiff as of the defendant: *Aglionby v. Towerson (e)*; and secondly, the performance of the work is pleaded by way of satisfaction, and the plaintiff, therefore, has no right to traverse the accord: *Peyton's case (f)*. This furnishes a decisive answer to the demurrer.

Mr. *Molynous*, in reply.—The plea is by way of accord and satisfaction, and not by way of satisfaction alone, and therefore *Peyton's case* does not apply. In *Bro. Abr. Traquers*, 179, 4 H. 7-9, the rule is thus stated: "It is better to plead the satisfaction without accord, for if 'pleaded, although not necessary, it becomes material; and plaintiff has 'his election to traverse either the accord or the satisfaction.'" The plaintiff here, then, has a right to traverse the accord; and if so, it follows that the accord should have been stated with precision. The plaintiff could not, with safety, have traversed the accord or agreement by reason of the uncertainty wherewith it is stated in the plea, which is designedly framed for the purpose of forcing the plaintiff to traverse the satisfaction. The only mode of traversing the accord would be, by a denial that the plaintiff agreed to accept the work in the said plea mentioned, the plea not in fact stating what that work was. The plea is analogous, not to a count for work and labour, but to a special agreement; and such a form of pleading in the case of a special agreement would be bad.

Secondly—The plea does not state the particular work performed, or the quantity and value of the materials supplied. It has been said, that these are matters as much within the knowledge of the plaintiff as of the defendant; that, however, furnishes no answer to the objection for want

(a) 3 Mod. 35.

(c) 1 T. B. 748.

(e) T. Raym. 399.

(b) 2 M. & Sel. 378.

(d) 1 Wms. Saund. 47.

(f) 9 Co. 80.

of certainty. In *Andrews v. Whitehead* (a), it was urged that less certainty was required in pleading what was within the other party's knowledge; but Bayly, J., answered, that is, where the matter is *peculiarly* within the knowledge of the other party. It cannot be said, that the work performed by the defendant in this case was peculiarly within the knowledge of the plaintiff. No precedent for so loose a pleading as this can be found. This general way of stating the performance of work and labour is peculiar to declarations in *indebitatus assumpsit*.—[CHIEF BARON. What do you say to a plea of set-off?—That is a *quasi* declaration; and the plaintiff is there entitled to a bill of particulars. With the loose mode of pleading tolerated in those cases, the Courts introduced the practice of requiring a bill of particulars, which prevented surprise on the opposite party. But the defendant here seeks to avail himself of a general statement of certain work done, which the plaintiff has no means of discovering and preparing to meet.—[CHIEF BARON. Upon a proper application, the defendant might have had a bill of particulars in this case.]—There is no instance of a defendant being obliged to furnish particulars except under a plea of set-off or in an ejectment, where he is the actor.

Cur. adv. vult.

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This case was allowed to stand over from the last law day, not from any difficulty which we felt with respect to our decision, but that we might have an opportunity of looking into some authorities to which we were referred. It is an action of trespass *quare clausum fregit*, to which, amongst other pleas, the defendant has pleaded the following:—[His Lordship here read the third plea.]—To this plea the plaintiff has demurred, upon the ground that neither the nature of the agreement, nor the particulars of the work performed pursuant to it, have been stated with reasonable certainty.

The first objection which has been urged to the plea is, that it commences with a statement of an agreement between the plaintiff and the defendant, that the latter should perform certain work for the former, but that it does not state that agreement with sufficient certainty. This plea is, however, in substance, nothing more than a plea averring the performance of certain work by the defendant for the plaintiff, and the *acceptance* of it by the latter in *satisfaction* of the trespasses complained of; and in that point of view, the plea would have been perfectly good, although it had altogether omitted the introductory statement with respect to the agreement. This is an answer to the main argument in support of the demurrer—namely, that by reason of the uncertainty of

(a) 13 East, 102.

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the statement, the plaintiff could not have traversed, or taken issue on the alleged agreement or accord; for if any such traverse or issue had been taken, it would have been bad, as a traverse of matter wholly immaterial to the substance of the plea, and which matter might have been struck out of the plea without vitiating it.

On this branch of the argument, the case of *Thurman v. Wild* (a) is applicable, as showing that a traverse of immaterial matter, or one involving an immaterial issue is bad. In that case it was held, that where a defendant introduces an immaterial averment into his plea, the plaintiff cannot in his replication so traverse the matters of the plea, as to include such immaterial averment in the issue. Therefore, the defendant in that case having pleaded that the trespass was committed by the command of one P. Barry, and then stated an executed accord between the plaintiff and Barry, *with the consent of the defendant*, and acceptance thereof by the plaintiff in satisfaction of the trespasses, the Court ruled that a replication traversing the accord and execution thereof *with the consent of the defendant*, was bad on special demurrer; for, that as no rights of the defendant appeared to be compromised by the accord, his consent was unnecessary. This is a decision exactly in point, and therefore, so far as regards that part of the present plea which states the agreement, we think it is immaterial, and that consequently it could not have been traversed by the plaintiff.

However, the demurrer was sought to be sustained upon another ground, viz., that the statement of the work done is too general; that ground is, in our opinion, equally unsustainable with the former. It appears to us, that it would lead to great prolixity in pleading, were it necessary, as contended for by the plaintiff's Counsel, to set forth in the plea the nature and particulars of the work done, or the quantity and value of the materials provided, and that such a mode of pleading would be objectionable, as falling within the authorities which prohibit the introduction into pleadings of matters of evidence.

In the course of the argument, I adverted to the instance of a plea of set-off, which is just as general in the statement of the subject matter of the set-off, as a declaration would be in its statement of the same cause of action. A plea of set-off is in truth a plea of satisfaction made so by statute. Were this a plea of set-off, the statement of the work would be sufficiently certain; and it appears to us that, as a plea of satisfaction, it requires no greater particularity. Mr. *Molynaux*, in support of the demurrer, on the first point, cited a case from *Bro. Abr. (b)*, which, as cited, created some doubt in my mind; but on looking to the case, I find the plea contained no averment of an *acceptance in satisfaction* on

(a) 11 A. & E. 453.

(b) *Bro. Abr. tit. Traverse*, 179; 4 H. 7-9.

the part of the plaintiff. That circumstance clearly distinguishes the plea there from the present one, and removes the only difficulty which I felt in the case.

We must, therefore, overrule the demurrer, and give judgment for the defendant.

Demurrer overruled.

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THE ATTORNEY-GENERAL v. UPTON.

(*Revenue Exchequer.*)

Nov. 23, 24.

SCIRE FACIAS on a Crown-bond.—The writ was in the following form:—

“Whereas John Upton of, &c., in the county of Limerick, Esq., by his writing obligatory dated the 20th day of November, in the year of our Lord 1840, sealed with his seal, and perfected at the city of Dublin in the parish of St. Michael the Archangel, in the ward of St. Michael, in the county of the same city, and now remaining of record in the office of our Chief Remembrancer of our Exchequer in Ireland, is holden and firmly bound to us in the sum of £2000 sterling, to be paid to us, our heirs and successors.

“And whereas he has not as yet paid, or caused to be paid, to us the said sum as is said, and we being willing that the said sum of £2000 sterling should be satisfied to us with all speed, as is just, do therefore now command you, that you omit not by reason of any liberty in your bailiwick, but do enter the same, and by honest and lawful men of your said bailiwick, make known to the said John Upton that he be before the Barons of our Exchequer at the Queen’s Courts Dublin, on Friday the 27th day of January instant next coming, to show cause, if any he can, or knows, wherefore we ought not to have execution against him for the said sum of £2000 sterling; and you are then to have there the names of those by whom you shall make it known to him, and this writ.

“Witness, the Right Honorable Maziere Brady, Chief Baron of our said Exchequer, at the Queen’s Courts aforesaid, the 11th day of January, in the sixth year of our reign.”

The defendant having pleaded *nul tiel record*, and the plaintiff having replied *tiel record*, a day was fixed for the inspection of the record, upon the production of which it appeared that the bond was conditioned that one N. U. should duly perform the duties connected with the office of

In a *scire facias* on a Crown-bond or recognizance; *Held*, on plea of *nul tiel record*, that it is unnecessary to set forth the condition of the bond or recognizance, it appearing from the uniform course of precedents in the office, to be the practice to omit the condition.

Semble, that such practice is borne out by the authorities.

M. T. 1843. a stamp distributor, to which office he had been recently appointed.
Rev. Esch. The condition (which was of considerable length) was annexed to the
 ATTORNEY- bond.
 GENERAL

UPTON.

Mr. *R. Ferguson*, for the defendant.—The condition of the Crown-bond not being set out in the *sci. fa.*, the defendant is prevented from taking advantage of any defect in the condition. We cannot crave oyer of it, as in the case of a common bond, and then demur, because oyer cannot be demanded of a record. When the condition of a bond in an ordinary case is set out on oyer, it is in fact part of the plaintiff's pleading; for when pleadings were *ore tenus* the plaintiff on oyer read the condition, and the defendant then demurred. Now, after oyer the defendant sets out the condition, but it is still part of the plaintiff's pleading, who is supposed to have read it in open Court. "The effect of setting out a deed in oyer is to incorporate it with the declaration:" *Com. Dig. Pleader*. Of a record, however, oyer will not be granted, and cannot be claimed: 1 *Chit. Pl.* 366. If, therefore, a defendant obtains a copy of it, and sets it out, it becomes part of his own pleading, and he cannot take advantage of it. It is consequently clear, that the practice of this Court or its officer, in not setting forth the condition of the Crown-bond, deprives the defendant of all opportunity of taking advantage of any defect or irregularity in its condition; such a practice, however inveterate, should not be upheld. *Atterbury v. Ward*(a) and *Cross v. Porter*(b), show that the condition ought to be set out in the *sci. fa.* *Malland v. Jenkins*(c) is distinguishable; for there the recognizance and condition were not only separate instruments, but separate records. In *Hind v. Campbell*(d) the condition is set out, although subscribed in the same manner as in the case of a bond. In 2 *Saund. on Plead.* 752, in debt on recognizance, the condition is set out, although it is subscribed to the recognizance, and not strictly embodied in it; so also, in the form given in 2 *Chit. on Plead.* 479.

The judgment of the Lord Chancellor, in *The Queen v. Hurly*(e), is decisive on this point, that the obligation and condition of the present bond are one instrument. Oyer of a record, as of letters patent enrolled in Chancery, cannot be claimed, although pleaded with a proferet; 1 *Chit. on Pl.* 366, 6th ed., and cases there cited. In 2 *How. Rev. Esch.* there is a form of *sci. fa.* on a recognizance, almost identical with the bond in this case.*

(a) Barnes' notes, 60.

(b) *Ibid*, 399.

(c) *Ibid*, 98.

(d) *Lilly's Entries*, 521.

(e) 4 *Ir. Eq. Rep.* 637.

* See *Lilly's Entries*, 389; and *Tidd's Forms*, 447, 8th ed.

Mr. *Smyly*, contra, for the Attorney-General.—It is not the practice in this Court to set forth in a *sci. fa.* the condition of a Crown-bond; and no modern precedent can be found in which it has been done. The proceedings are regulated by the 21 & 22, G. 3, c. 20, Ir.; and fully detailed in *Bateman's Excise Laws*, p. 117, n. Two of the cases cited from *Barnes*, are short and unsatisfactory notes; but in the third—*Malland v. Jenkins* (a)—which is more fully reported, it was held unnecessary to set out the condition of the recognizance. *The Queen v. Hurly* (b) is a distinct authority, that where it appears to have been, for a long period the uniform practice in the office to omit the condition from the *sci. fa.*, the Court will not disturb it.

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Mr. *Ferguson*, in reply.—The statute of the 21 & 22 G. 3, c. 20, makes no difference as to the mode of pleading; and *Bodenham v. Hill* (c) and *Roberts v. Howard* (d), show that mere practice will not warrant an improper mode of pleading.

Cur. adv. vult.

BRADY, C. B.

We directed our officer to make a search in the office for precedents in cases of this kind, and he reports to us that there is not any record of a modern date to be found in the office in which the condition of a Crown-bond or a recognizance is set forth in the *scire facias*; but, on the contrary, he has furnished us with a precedent used in the office for many years, in which the condition is not set forth.

Such being the settled course of the precedents in this Court, we see no reason to deviate from it in the present instance, and we accordingly hold that the *scire facias* is sufficient although it does not set out the condition of the bond. Speaking for myself individually, I would say there is much to be urged in support of such a practice. I do not concur in what is stated to have fallen from the Court in the case of *The Queen v. Hurly* (e), with respect to the necessity of setting forth in a *scire facias* the condition of the recognizance; nor do I agree that, upon authority, the question is concluded. The rule, as there stated, no doubt, may apply to cases in which, in order to show a right to sue, it is necessary to state a breach of the condition, as in the ordinary case of a bail bond, in which the parties do not bind themselves in an absolute or unqualified manner to pay a sum certain, but in which they bind themselves conditionally to pay on the happening of certain events. But where the parties become bound in a sum certain, and the condition is

(a) p. 93.

(b) 4 Ir. Eq. Rep. 637.

(c) 7 M. & W. 274.

(d) 9 M. & W. 838.

(e) 4 Ir. Eq. Rep. 642.

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for the benefit of the opposite party who seeks to avail himself of it, he must set it forth in his pleading. The case from the *Year Book* (a) cited in the argument of *The Queen v. Hurly* (b), seems consistent with this distinction; and the cases which have been cited from *Barnes' Notes* (c) also bear out this view, for the cases in which it was there held necessary to set out the condition of the recognizance were cases of bail, and *nul tiel record* was accordingly held to be a proper plea. But in one of the cases quoted from *Barnes*—*Malland v. Jenkins* (d)—which was a *scire facias* on a recognizance of bail on a writ of error, it was held to be unnecessary to set forth the condition of the recognizance; and on looking to the form of the recognizance of bail in error, it will be seen that the parties become bound in a sum certain in the first instance.

We have been referred to a precedent in *Lilly's Entries* (e), in which the condition of the recognizance is set out in the *scire facias*, but that is also the case of a *scire facias* on a recognizance of bail. In the preceding page, however, of the same book, there is a case in which the condition of the recognizance is omitted from the *scire facias* (f); thus showing that the rule which requires the condition of the recognizance to be set forth in the *scire facias*, applies only in cases of bail, and not to the ordinary case of a bond and condition.

In *Coke's Entries*, p. 634, there is a precedent also illustrative of this distinction; but it is unnecessary to pursue the subject further, as it is enough for us to say that, the course of practice and precedent in this Court being such as I have stated, we will not now disturb it.

Judgment must, therefore, be given for the Attorney-General.

(a) 36 *Hen.* 6, fol. 2.

(b) 4 *Ir. Eq. Rep.* 840.

(c) *Atterbury v. Ward*, *Barnes*, 60; *Crosse v. Porter*, *ibid.* 339.

(d) p. 93.

(e) p. 521.

(f) *Ford v. Taylor*, p. 520.

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COFFEY in Error v. BURRISS.

(In Error from the Common Pleas.)

May 28.
June 4.

THIS case came before this Court on a writ of error, brought to reverse a judgment of the Court of Common Pleas, which was given on a bill of exceptions in favour of the plaintiff below. The facts and circumstances of the case are fully reported in the 6th *Irish Law Reports*, 298–304. They are also stated in the judgment of Pennefather, C. J., in this Court. The points raised by the bill of exceptions, and argued in the Court below, were two; first, as to the admissibility of the evidence of a witness; and secondly, as to the propriety of the direction of the Judge. The same questions were argued in this Court.

Mr. *David Lynch* and Mr. *Macdonogh*, Q. C., for the plaintiff in error, cited the following authorities in addition to those which were relied on in the Court below. As to the competency of the witness—*Jordaine v. Lashbrook* (a); *Smith v. Chambers* (b); *Doe d. Tatham v. Wright* (c); *Worrall v. Jones* (d); *Doe d. Pye v. Bramwell* (e). As

To a declaration in trespass *q. c. f.*, for breaking, &c., the plaintiff's close, and erecting pens and tables there, the defendant pleaded the general issue; and at the trial proved a demise for a term of years of the *locus in quo* in the following terms:—
“All that and those that part of the house known as 119 North King-street, corner of

“Smithfield, consisting of the small room of the bar of said house fronting Smithfield, &c., together with the front part of said premises extending from said office to the centre of Smithfield market, &c., and to be used by said R. B. (the plaintiff) as a stand for the sale of cattle and hay, according to the usage of Smithfield market;” and also gave evidence of a custom for the owners of houses in Smithfield to let their frontage to salesmasters at a rent; and of the commission of the trespass complained of. On the other hand, the defendant gave evidence of no such usage being in existence in Smithfield, which was a public market; and some evidence of the lessor of the plaintiff having no title to demise the frontage: and the Judge directed the Jury, that if they believed that on a market day, the plaintiff had taken possession of the *locus in quo*, and was in the actual possession of the said frontage demised to him; and while so in possession, the defendant entered thereon against the will of the plaintiff, they should find for the plaintiff. *Held*, that the said direction was incorrect; and that the Judge ought to have explained to the Jury the distinction between a right to exclusive possession, which would have enabled the plaintiff to maintain this action, and such a right of occupation as was necessary for the enjoyment of an easement, which was not sufficient to maintain an action of trespass; and to have directed the Jury, that if they believed that the plaintiff had a right to the exclusive possession, they were to find a verdict for him; but if they believed that he had only a right to an easement, they ought to find for the defendant, the action not being maintainable.

If a man is incompetent to be examined as a witness on the ground of interest, the evidence of his wife is likewise inadmissible. If a witness is incompetent to be examined on any point, on the score of interest, he is incompetent to be examined at all.

(a) 7 T. R. 603.

(b) 4 Esp. 164.

(c) 3 N. & M. 268.

(d) 7 Bing. 398.

(e) 3 Ad. & El. N. S. 309.

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Mr. *Holmes* and Mr. *Napier*, Q. C., for the defendant in error, relied on the following additional authorities:—As to the incompetency of the witness—*Reece v. Walters* (c). As to the misdirection of the Judge—*Harker v. Birkbeck* (d); *Lewis v. Ponsford* (e); *Whittington v. Boxall* (f); *Matson v. Cook* (g).

The case of *Hawksworth v. Showler* (h) was referred to by the Chief Baron as an authority in favour of the exception to the admissibility of the witness.

PENNEFATHER, C. J.

In this case of *Coffey in error v. Burriess*, although the Court are not about to confirm the judgment of the Court of Common Pleas, and although they are about to send back the parties to a new trial, there is, upon the whole, so much unanimity among the Members of the Court, that they have thought it better that I should deliver the general view they have taken of the questions which have been discussed, rather than occupy the time of the public by severally delivering their judgments, when there exists little, if any, difference of opinion among them.

This was an action of trespass *quare clausum fregit*; and the declaration contained two counts. The first count was for breaking and entering the plaintiff's close, situate in Smithfield, &c., and then and there putting, placing, and erecting divers pens and tables in and upon said close, and keeping and continuing the same there without the leave and license, and against the will of the plaintiff; and thereby hindering the plaintiff from having the use and benefit thereof, &c. The second count was for entering the close of the plaintiff, and expelling him from the possession, use, occupation and enjoyment thereof. To this declaration the defendant pleaded the general issue, and no other plea; and on the record so framed, the parties went to trial before Judge Ball, at the Sittings after Easter Term 1843.

This was an action founded on possession, which may not have required any proof of title, but which, at the same time, did not exclude the party (if he so thought proper) from proving his right and title to maintain his possession. The case made by the plaintiff at the trial was, that the

(a) 1 H. & B. 524.

(b) 8 B. & C. 294.

(c) 1 H. & M. 110; S. C. 3 M. & W. 5, 7.

(d) 3 Burr. 1557.

(e) 8 C. & P. 687.

(f) 7 Jur. 723.

(g) 4 Bing. N. C. 392.

(h) 12 M. & W. 45.

premises in question were a part of Smithfield market in the city of Dublin, and that he was the lessee of a house in Smithfield, which was a public street and market in the city of Dublin, under and by virtue of a lease executed to him in the year 1842, by one John Martin. The language of this lease is material, and it is set out on the face of the bill of exceptions, in which shape this case comes before this Court, and was previously argued before the Court of Common Pleas, by whom judgment was given in the manner hereafter mentioned.

The lease from Martin to the plaintiff was a lease of "All that and those, that part of the house known as No. 119 North King-street, corner of Smithfield, consisting of the small room of the bar of the said house, fronting Smithfield, and which is to be fitted up as an office at the expense of the said Richard Burriss, with the entrance from Smithfield, as laid out between the parties to said lease, together with the front part of said premises, extending from said office to the centre of said Smithfield market, as formerly in possession of Messrs. Brophy and Coffey (the defendant), salesmasters, and then in the possession of said Richard Burriss (the plaintiff); and to be used by the said Richard Burriss, as a stand for the sale of cattle and hay, according to the usage of Smithfield market; and which said premises are situate, &c., to hold the same for the term and space of fifteen years, yielding and paying, &c."

The plaintiff then read, and gave in evidence, a lease made by and between James Carolin of the one part, and the defendant of the other; whereby it was witnessed, that for and in consideration of the rent and covenants therein mentioned, the said James Carolin demised to the defendant all that the standing in front of the house No. 38 Smithfield, and all the estate, privilege, right, title and interest of the said James Carolin, of, in, and to the footpath in front of said house, and to the street opposite said house, so far as the same had been, or is, or can be used as a standing for cattle, sheep, or other stock, and as may at any time be required by the said Charles Coffey, for the standing and use of his cattle, &c., in Smithfield market aforesaid. And it was admitted, that at the time of the execution of the said lease, and since, the plaintiff was a licensed salesmaster. These are the instruments on which the plaintiff in this case sought to found and fortify his title to the possession of the premises in question; and from what appears on the face of these documents, it is very equivocal indeed what is the meaning of them, or either of them,—whether they conveyed, or did, or could convey a right to the exclusive possession of the close or closes in each of the several deeds mentioned; or whether they conveyed, or did, or could convey any thing more than a certain easement, or right of standing in the market for the sale of cattle on the market days? I say, that both one and the other of them were very loose and equivocal as to what was their precise and legal

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effect. I need scarcely say, that unless in point of law, they, or one of them, conveyed a right exclusive of all others to the actual possession and soil of the respective closes in front of the houses, they did not convey such a possession as entitled the party claiming under either of them to maintain an action of trespass *quare clausum fregit*. If, on the other hand, they, or either of them, did convey or pass an exclusive right to the possession, conferring on the lessee that right exclusive of all others, then, it is equally plain, that the party would be entitled to maintain trespass for an injury done by the defendant to that possession in turning him out of it, or fixing obstructions in it as described in the declaration.

Many witnesses were examined on behalf of the plaintiff, and of the defendant, in support of their respective cases; and because that the leases referred to the usage of Smithfield market, a great deal of evidence was given on the part of the defendant to show what that usage was, and that the leases, as explained by it, conferred no exclusive privilege or right to the soil, but only an easement, or right of standing on the soil, for the purpose of exposing cattle for sale in the market, during market hours.

I have now stated generally the views taken, and the points urged on behalf of both parties. It was also proved, or attempted to be proved, on the part of the plaintiff, that a payment of rent, for a certain purpose, was made to Martin by the defendant; by the production of the said Martin himself in the first instance: and it was objected, on the behalf of the defendant, that, being the lessor of the plaintiff, and having a direct interest in the result of the trial, his evidence was inadmissible. On that objection being made and argued, the plaintiff fearing to persevere in his production, withdrew the said Martin as a witness; and then, in order to supply the deficiency, produced his (Martin's) wife—as if, the husband being rejected as a witness on the ground of interest, the wife could be admitted in the same character as being uninterested. The objection was accordingly repeated as to the admissibility of the wife; but Counsel for the plaintiff having persisted, she was examined; and the objection to her admissibility formed the ground of the first exception on the record. Now, the plaintiff having yielded to the objection as regarded Martin himself, but having persisted in the examination of his wife, who was, in the opinion of this Court, as inadmissible to be a witness as her husband, he has exposed his verdict to the misfortune of being set aside.

Many cases were referred to in the course of the argument, both in this Court, and in the Court below, showing that where the husband's evidence is inadmissible on the ground of interest, that the evidence of the wife is equally objectionable. I may mention the cases of *Doe d. Lord Teynham v. Tyler*; *Biss v. Moutain*; *Wedgewood v. Hartly*; and lastly, the recent case of *Hawksworth v. Showler*, reported in 12 *Meeson & Welsby*, p. 45, which was decided in the Court of Queen's

Bench in England, on the day after the decision of this case in the Court below. Great consideration appears to have been given to the question in that case; and we may, therefore, now conclude, that by virtue of the authorities mentioned, as well as by the obvious reasoning of the case, not only was John Martin, but his wife likewise, was inadmissible as a witness on the trial of this record.

It was also argued on this part of the case, that, at all events, there were many points on which both Martin and his wife might have been examined; and that if the examination had been confined to such questions as the witness had no direct interest in, no objection could have been taken to their testimony; and that, therefore, the exception to their being examined at all, was too wide. But it has been decided by all the authorities, but more particularly by the late case of *Hawsworth v. Showler*, that the Court is not at liberty to sift out, whether, or how far, evidence is to be given or taken by or from a witness; and a person is not to be allowed to be a witness, whose admissibility depends on the contingency of the line of examination to be adopted by Counsel, and not on a general principle. Now, that John Martin was interested there is no doubt; and accordingly, we find that he was relinquished by the plaintiff's Counsel at the time of his production and the objection taken; and if so, his wife was also interested, and therefore equally inadmissible as a witness, the sole question being, interest or no interest, by which the Judge is relieved from all considerations of the nature of the line of his examination. Thus, an inadmissible witness having been examined, though objected to, evidence was given at the peril of the plaintiff, which ought not to have gone to the Jury at all; and on that ground a *venire de novo* must issue.

There were eight other exceptions; and at the close of the evidence, the defendant's Counsel insisted that they were entitled to a verdict, the plaintiff not having made out his case. The Judge did not, however, yield to their demand for a direction in favour of the defendant; nor, on the other hand, did he yield to a similar demand for a direction in favour of the plaintiff. But, though the Judge did not give a direction in favour of either of the parties, and though he did not absolutely transgress in his direction what the Court would say was the law, yet this Court is of opinion, that he did not sufficiently draw the attention of the Jury to what was the real state of the law on the subject. He did not, in fact, sufficiently lay down the distinction between the nature of an occupation to the extent of the enjoyment of an easement on the premises, and of an occupation where the party had a right to the exclusive possession of the soil. It is not necessary that the Court should pronounce any judgment beyond what I have already stated, inasmuch as a *venire de novo* must issue by reason of the improper reception of the evidence, which forms the subject matter of the first exception. However, as the case is to be submitted to another Jury on another trial,

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we think that it might be tried with more satisfaction, if the attention of the Jury were more particularly called to the nature of the possession necessary for the enjoyment of an easement; and more clearly informed of the distinction between that possession, and the possession of a party entitled to the exclusive possession; because it is very equivocal indeed what passed by the lease, whether an absolute, entire, and exclusive possessory right, or no more than a right, according to the practice and usage of the market, to pen cattle on a market day.

The eight other exceptions are, we think, involved in the same subject, viz., that the Judge did not sufficiently call the attention of the Jury to the law as applicable to the facts; and when the case was argued before the Court below, one, indeed I may say two, of the Judges took the same view of this question; and one of them (Mr. Justice Torrens) delivered the same opinion as that now entertained by this Court. The opinion of my Lord Chief Justice of the Common Pleas was, if I have not misconceived his opinion, substantially the same; but he gave his judgment with the other two Judges of the Court, who considered that all of the exceptions should be overruled, in order that there might be a judgment, so as to enable the parties to bring the questions before this Court. We are not, therefore, taking a course in opposition to the opinion of the Court below, in allowing the eight remaining exceptions. The judgment of the Court is generally, that a *venire de novo* do issue.

TORRENS, J.

In this case, as one of the members of the Court below, I think it right to say, on the question of the admissibility of the evidence of Mr. Martin, that I at first had formed an opinion similar to that expressed by my Lord Chief Justice; and was led to a change of that opinion, from an investigation of the authorities which overruled the principal case on the subject—viz., *Rex v. Cliviger (a)*; which led me into an examination of the law as respects the policy of a wife being examined in cases where the husband was incompetent as a witness; and I was thereby erroneously led to change my first impression. I say erroneously—for on a re-examination of the authorities, I find the distinction taken with respect to cases in which the husband's testimony is rejected on the score of interest in the result, and where it is held that the testimony of the wife is equally inadmissible as that of her husband. On the main branch of the case, I expressed an opinion similar to that expressed by my Lord Chief Justice on the subject; and delivered a judgment to that effect in the Court below.

BALL, J.

Concurring as I do in the opinion expressed by my Lord Chief Justice

(a) 2 T. R. 268.

on both of the points which have been raised and discussed on this record, I am desirous of making a few observations with respect to the part taken by me, when this case came before the Court below. As to the first point—viz., the admissibility of the evidence of Mrs. Martin—I find, on referring to the printed report of my judgment, that I gave no opinion whatever, it having appeared to me that the question was not open on the form in which the exception was taken; and that, therefore, I was not called upon to pronounce my opinion upon it. The case of *Quin v. The National Insurance Office* (a), seemed to me an authority sufficient to warrant me in coming to such a conclusion, inasmuch as there appeared to be certain parts of the evidence she gave which could not be objected to on the score of interest. Accordingly, it struck me that the parties taking the objection ought to have confined it to that portion which was objectionable in respect of her being an interested witness; and the exception not having been so limited in its language, I conceived that I was not called on to give any opinion on the question. However now, for the first time, and during the progress of the argument in this Court, it appears that a case has been decided in the English Courts, on the day after the argument of this case in the Court below, and which of course was not in print at that time, and which seems to have been unknown to the Profession until attention was called to it by my Lord Chief Baron; and which case has decided the question at issue. In that case, Chief Baron Abinger observes:—"It is said she is only required to be examined as a witness on a particular point, which would not prejudice or affect her husband. If a witness is competent at all, he may be examined upon every matter upon the record. I remember, at one time it was thought that an objection could be made to a witness with reference to the particular kind of question to be put to him, but that notion is long since exploded, and now a witness is considered competent, or incompetent, upon the general ground of exclusion of interest one way or other." Such being the state of the law at present, my objection as to the admissibility of the evidence of the witness in this case, having been founded on a practice which appears to have prevailed, but has now been exploded in England, of course has no foundation; and therefore, although the exception was in form taken to the whole of the evidence of the witness, still it was sustainable, and could not be met by the argument, that the witness was admissible to be examined on some points; and whatever may have been the former practice in this respect, if we are to take the law as it has been laid down in the foregoing case, it is not open to a party to insist, that where a witness is not interested as to a large portion of the matter in dispute, that that witness is not to be rejected *in toto*. Assuming, therefore, that the law so laid down by my Lord Abinger is correct, and that the same practice prevails in this

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(a) 5 Law Rec. N. S. 274.

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country as in England in that respect, I was bound to have given my judgment in the Court below in favour of the exception.

As to the second point raised, and which was the main question for the consideration of the Court—that is to say, whether it ought to have been left to the Jury to consider, on the evidence produced before them, what was the nature of the possession of the plaintiff in the *locus in quo*, it appeared to me, that it was not competent for the defendant to raise that question at all, the action being grounded on possession alone, without any reference to the nature of it, and which he was not therefore at liberty to inquire into. That struck me as being the general law on the subject; but it was insisted in the argument in the Court below, that notwithstanding such being the general law—viz., that possession is alone sufficient to maintain the action, yet that it should have been left to the Jury to say, on the circumstances of the case as they appeared in evidence, as to the way in which the possession had been acquired and was kept, what was the nature of it. With respect to this question, it struck me in the course of the argument in this Court, although such was not my opinion when the case was before the Court below, that though it is not for a defendant in an action, where possession alone is the foundation of it, as in an action of trespass *quare clausum fregit*, to put the plaintiff on proof of title, yet where he has put himself on title, and thereby brought into question the nature of the possession, the defendant has a right to take the opinion of the Jury on the nature of that possession, whether it is of such an exclusive description as to enable him to maintain trespass for an interference with it; or whether, on the other hand, it is such a possession as is necessary for the enjoyment of a mere easement, and which is not of such an exclusive nature as to invest him with a right to maintain trespass against any person intruding on it. In the case before us, after the evidence given by the plaintiff, it was not, I think, competent for him to deny the defendant's right to have the opinion of the Jury on the nature of the possession, although it appeared to me on the argument below, that on the form of the exception, it was calling on me to leave a question of law to the Jury.

However, I have now no hesitation in giving my judgment that a *venire de novo* should issue on both points.

JACKSON, J.

As one of the Judges, on whose judgment this writ of error was brought, and concurring as I do in the opinion of this Court, reversing that judgment, I think it right to say a few words to show how my opinion has been modified by the discussion which has taken place here. As to the main question, viz., the principle on which an action of this description is maintained, the opinion that I delivered in the Court below was, that this was a possessory action, and that if the plaintiff in

such an action of trespass *quare clausum fregit*, proved that he was in the actual and exclusive possession, and that that possession had been invaded by another party, he was entitled to maintain his action. Further, that in trespass *quare clausum fregit*, if the defendant meant to rely on such a case as I understood this case to be, viz., that the owner in fee of the *locus in quo*, at some distant period of time, dedicated it for a public market, and that the defendant, as one of the community, availing himself of his right of entry thereon, committed thereby the alleged trespass; if that, I say, were the case, I was of opinion, that the defence ought to have been made by special plea, and that the defendant was not at liberty to make such a case on the plea of the general issue. Such was my opinion; and looking at the record as it is framed, I thought that the plaintiff must be taken to have established his exclusive possession of the *locus in quo*; because on the 8th exception, the learned Judge having refused to direct the Jury, "that under the indenture of the 15th of "September 1842, the plaintiff had not, and on the whole of the evidence "could not have had, an exclusive legal possession of said place, in "which, &c., at the said times when, &c., and that, therefore, the plaintiff "had no right to maintain his action of trespass," went on to inform them, "that if they believed, that on a market day the plaintiff had taken "possession of the *locus in quo*, and was in the actual and exclusive "possession of the said frontage demised to him by the said John Martin; "and that whilst the plaintiff was so in possession of said frontage, the "defendant entered upon the place in question, against the will of said "plaintiff; and expelled the plaintiff from such actual possession, and "prevented him from using it for the sale of his cattle, they should find "a verdict for the plaintiff;" and the Jury then found a verdict for the plaintiff. Such being the facts as stated on this record, it appeared to me, that on it the plaintiff had established the fact of his having been in the actual and exclusive possession of the *locus in quo* at the time of the commission of the trespass complained of; and that, therefore, the action was clearly maintainable. However, on the discussion of the case in this Court, I have come to the conclusion, that our judgment ought not to have proceeded on that ground, but on this, that the plaintiff having given in evidence a lease from one John Martin to himself, on the face of which appeared his right to the possession he claimed of the *locus in quo*, and having given parol evidence of what passed, or was intended to pass by that lease to him, such evidence ought to have been submitted to the Jury for them to pronounce their opinion on the true character of the possession. There is a further ground which has influenced me in the opinion at which I have now arrived, which was not argued in the Court below, viz., that the plaintiff having himself gone into evidence with respect to the nature of his right to the possession of the *locus in quo* (the defendant not having at the time gone into his

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defence on the general issue), obliged the defendant to go into evidence of a similar nature to, contradict it. Much evidence was, therefore, brought by the plaintiff himself before the Jury with regard to the nature of his possession, and if that evidence had been sent to the Jury, with an explanation by the Judges of the distinction between a right to exclusive possession, and that possession which is necessary and sufficient for the enjoyment of an easement, they might, perhaps, have come to a different conclusion. Justice has not, therefore, in my opinion, been done between the parties; and a *venire de novo* should therefore issue.

As to the other question, if I were to go into it at length, I should hold the same views of it which have been expressed by my Brother Ball. I concurred in the opinion of the Court below on the ground, that on the authority of the case of *Quin v. The National Insurance Company*, the exception was taken too wide. However, the Chief Baron referred to an authority to show that the law, as it stands at present, is, that if a witness is incompetent as to any portion of his evidence, that incompetency extends to the whole of his testimony. I am, therefore, of opinion that a *venire de novo* should issue on both grounds.

BRADY, C. B.

I did not refer to the case of *Hawkesworth v. Showler*, as having effected any change in my mind, with regard to the law on the question which was raised and argued in that case, as I entertained no doubt on the subject. I never, in my experience, knew of a witness being examined in the way suggested by the Counsel for the plaintiff; and I did not, therefore, refer to that case as having established a new rule on the subject. As to the question, whether the plaintiff had, in this instance, a right to the exclusive possession of the *locus in quo*, I would refer to the case of *Tyssen v. Smith*, 1 Nev. & Per. 784, and which was affirmed in Error, as appears by the report in 1 Per. & Dav., as showing *prima facie* that a stall does not give a right to exclusive possession; wherein it was decided, that a custom for all victuallers to erect boothes on a common, being parcel of the waste of a manor, a reasonable time before the Monday next after the feast of Pentecost, and to continue them so erected until the feast of All Souls, paying to the lord two pence, is a good custom; shewing that without such a custom there could not be a right to exclusive possession.

PENNEFATHER, B.

With respect to the question of the admissibility of the witness, I always considered the law to be as laid down in the case of *Hawkesworth v. Showler*; otherwise a case might be established piecemeal, by the examination of several witnesses, all of whom might be interested in the result of the trial.

Reverse the judgment without costs.

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(*Exchequer of Pleas.*)

Nov. 22, 24.

ACTION of *assumpsit* by the plaintiffs as indorsees, against the defendant as drawer of a bill of exchange.

It appeared that the bill upon which this action was brought, and three other bills of exchange, bearing date respectively the 7th of December 1842, drawn by the defendant upon, and accepted by one Charles Daly, were so drawn and accepted for the purpose of securing to the plaintiffs the payment of £273. 19s. 7d., being the amount then due by the said Charles Daly to the plaintiffs for goods sold and delivered. Meighan the defendant was the uncle of Daly, who carried on business in Dublin; the plaintiffs were merchants residing in Manchester.

The defence was, that the plaintiffs and the other creditors of Daly had agreed to accept a composition of seven shillings and sixpence in the pound, to be secured by the drafts of Daly on Meighan, the defendant, whereby the latter was exonerated from his liability on foot of the original bills. Daly having become very much embarrassed in his circumstances, and a commission of bankruptcy having been issued against him, called a meeting of his creditors on the 29th of February 1843, and laid a statement of his affairs before them.

On that occasion, a memorandum of agreement or instrument of composition was signed by some of Daly's creditors who attended the meeting. The plaintiffs were not present; but they and other creditors of Daly subsequently signed the following agreement, which was given in evidence on the part of the defendant:—

“At a meeting of the creditors of Charles Daly, of Usher's-quay, Dublin, held on his premises, the under-mentioned creditors attended this 29th day of February 1843.

“Mr. Joseph Hines, solicitor, with Mr. Wynne, attended on behalf of Gill and Bishop, of Leeds, who have issued a commission of bankruptcy against Charles Daly, and stated that the commission issued because it was discovered that Mr. Daly had given a bond and warrant of attorney; but that if all the creditors would agree to compound with

terms: “Without prejudice to any additional security we may hold.” It further appeared that the arrangement with respect to the composition was entered into with the knowledge and concurrence of the defendant; and that the plaintiffs, at the time of signing the agreement, held no other security for the debt so due by D. than his said acceptances of the defendant's drafts. *Held*, that notwithstanding the reservation annexed to the signature, the plaintiffs, by signing the agreement for a composition, had discharged the defendant from his original liability as surety upon the bills so drawn by him and accepted by D. to secure the debt of the latter.

In an action against the defendant as drawer of a bill of exchange, it appeared that the bill in question, with others, had been drawn by defendant upon, and accepted by D., to secure a debt due by D. to the plaintiffs. D. having become embarrassed in his circumstances, and a commission of bankruptcy having been issued against him, called a meeting of his creditors, who signed an agreement to accept a composition of seven shillings and sixpence in the pound, to be secured by the drafts of D. on the defendant. The plaintiffs and other creditors of D. who signed the composition agreement, annexed to their respective signatures a reservation in the following

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" Mr. Daly, that Messrs. Gill and Bishop would not proceed to open the
 " commission ; that something must be done immediately, and before
 " Saturday next, to prevent the commission falling to the ground for want
 " of prosecution. Mr. Hines, on behalf of his clients, refused to sign any
 " document that would tend to neutralize the effects of the commission,
 " until the signatures of all the other creditors were had.

" Under such circumstances, we hereby agree to accept a composition
 " of seven shillings and sixpence in the pound, to be paid by bills at four,
 " eight and twelve months, secured by the drafts of Charles Daly on
 " Francis Meighan.

" Without prejudice to any additional security we may hold.

Per proc. " THOS. MAHON and Co.

" P. JAS. ALMA.

" Without prejudice to any additional security held by us.

" MAHON and POWER.

" Without prejudice to any additional security we may hold.

" YOUNG and Co.

" AUSTIN FERRAL.

" JOHN BYRNE.

" *Without prejudice to any additional security we may hold.*

" JOHN and EDMUND GRUNDY.

" Without prejudice to any additional security we may hold.

" DAY, BOTTOMLEY and Co.

" JOHN OAKES, on security.

" WM. H. BAY HUDDERSFIELD,

" For Joseph Hines.

" Mr. Daly to pay the law expenses incurred ; and we recommend the
 " other creditors to accept of the same composition."

This arrangement was proposed and entered into with the sanction of
 the defendant. It was admitted that at the time of signing the compo-
 sition agreement, the plaintiffs held no other security than the drafts of
 Meighan the defendant, for the amount of the debt so due to them by
 Daly.

For the defendant it was contended that the plaintiffs, by signing the
 agreement for a composition, had discharged him from his liability on the
 acceptances of Daly to his (the defendant's) drafts. The defendant also
 went into evidence to show a tender of the composition bills, pursuant to
 the terms of the agreement.

On the part of the plaintiffs it was on the other hand urged that the
 agreement was not intended as a final or conclusive arrangement with
 respect to the composition ; but that a deed founded on the agreement,
 and doing away with it, was subsequently prepared and actually executed
 by a number of the creditors. The plaintiffs further insisted, that in
 consequence of the reservation annexed to their signature—viz., " With-

out prejudice to any additional security we may hold,"—they were not precluded from proceeding against Meighan on the original bills.

The case was tried twice ;—on the first trial the Jury found a verdict for the plaintiffs ; this the Court set aside and directed a new trial, which accordingly took place before the Lord Chief Baron at the Sittings after Trinity Term 1843.

His Lordship sent three questions to the Jury, reserving the verdict for the decision of the Court above. The questions sent to the Jury were ; first, whether the composition arrangement was *bonâ fide* acted on and considered by the parties—Meighan and Daly—so far as it went, an agreement ; secondly, whether there was a sufficient tender of the composition bills under the memorandum of agreement ; thirdly, whether, if the tender was sufficient, it was made within a reasonable time ? The three questions were found in the affirmative.

Mr. Fitzgibbon, Q. C., now moved, pursuant to the reservation at the trial, that a verdict should be entered for the defendant.

The defendant is discharged from liability on the acceptances of Daly. The plaintiffs, by signing the agreement for a composition, discharged Daly from his liability on those acceptances, the effect of which is to discharge the defendant as the drawer. If the defendant were entitled in the event of the plaintiffs recovering in the present action, to recover over against Daly, this would be a manifest evasion of the plaintiff's agreement to take a composition, and would be a fraud both upon the other creditors and upon Daly, who would be circuitously liable to pay twenty shillings, notwithstanding the composition to take seven shillings and sixpence in the pound. If on the other hand, the defendant were to be deprived of his remedy over against Daly, he would be plainly damnified by the act of the plaintiffs in signing the composition.

Secondly—The abandonment by Gill and Bishop of the bankruptcy proceedings, was a good consideration for signing the agreement. And lastly, had the plaintiffs intended to reserve their remedies on foot of these drafts against Meighan the defendant, they should have done so in express terms, and not in ambiguous language, by adopting the formula used by the other creditors.

Mr. J. J. Murphy, Q. C., and Mr. Whiteside, Q. C., *contra*.—As Meighan was perfectly solvent, the agreement to drop the bankruptcy proceedings formed no consideration for the plaintiff's signing the composition ; and they never could have thereby meant to give up two-thirds of the debt already secured by Meighan, in consideration of his giving fresh security for the remaining third. The effect of the composition was to prevent the plaintiffs from recovering, under any circumstances, more than seven shillings and sixpence in the pound from Daly ; but that

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does not preclude them from recovering the entire amount of their debt from Meighan, as against whom they expressly reserved their right to proceed, and the reservation necessary to retain the remedy against the surety appears on the face of the agreement: *Ex parte Gifford* (a); *Ex parte Glendinning* (b); *Thomas v. Courtenay* (c).

In allowing the plaintiffs to recover the amount of their demand from Meighan, there is no fraud upon the principle of the composition, or upon the creditors, who were parties to the instrument, and thereby expressly apprised of the nature of the reservation annexed to the plaintiffs' signature. Neither would any injustice be thereby done to Meighan, as the composition was not entered into behind his back; he was a party to the entire arrangement, which was made with his sanction and concurrence; and it is clear that the surety may become a party to the transaction in such a manner as to deprive himself of any remedy over against the principal, in the event of his being called upon to pay the residue of the debt: the cases establishing this proposition will be found collected in the note to *Lewis v. Jones* (d). Meighan, before he gave the new bills pursuant to the composition agreement, had an opportunity of seeing the terms of the plaintiffs' reservation, which are comprehensive enough to include every species of security, whether of Meighan's or of a third party. This brings the case within the authority of *Mallet v. Thompson* (e), and *Nichols v. Norris* (f).

The fact of Meighan having been a consenting party to the agreement for a composition, would furnish a sufficient answer to any action to be brought by him against Daly. The distinguishing peculiarity of the present case is, that the person by whom the composition is secured, is the party bound by the original security.

It is only when a new arrangement is entered into with the principal, behind the back and without the knowledge of the surety, that the latter is released from his liability; but where the agreement between the creditor and the principal debtor is made with the privity of the surety, he is not discharged: *Cowper v. Smith* (g); *Forsythe on Comp.* 76.

Mr. J. D. Fitzgerald, in reply.—There are two points of view in which this case may be considered; first, regarding defendant as a mere surety; secondly, as to the effect of the special mode of executing the agreement. First, regarding defendant as a surety; was there not an alteration of the contract he had entered into, and that without his will and consent? That the holder has given time to the acceptor of a bill,

(a) 6 Ves. 807.

(c) 1 B. & Al. 1.

(e) 5 Esp. 178.

(b) Buck. 517.

(d) 4 B. & Cr. 515.

(f) 3 B. & Ad. 41, n.

(g) 4 M. & W. 519.

or compounded with him, is always a discharge to the drawer: *Nesbit v. Smith* (a); *Ex parte Smith* (b); *Story*, p. 500, *et seq.* The liability of a surety ought not to be extended beyond his contract; and if the necessary consequence of the stipulation between the creditor and the principal be to extend the liability of the surety, the surety ought to be discharged. Now, that is the necessary consequence here; the defendant contracted that Daly should be primarily liable, and that he, the defendant, should have the chance of the voluntary or compulsory payment of the debt by Daly: but those chances have been taken from him; Daly is discharged, and the contract of the defendant is made independent and absolute. In addition to this, when the principal obligation is extinguished, the accessory can no longer exist: *Pothier*, p. 2, c. 6, s. 1; *Chitty on Cont.* 529.

Secondly—Assuming the general proposition to be true, how is it affected by the form of signature in this case, “Without prejudice to any additional security we may hold?” The meaning of this reservation is, to protect the creditor’s right to resort to other securities in his hands, which otherwise he might be compelled to give up. A great injury has been done to Meighan by what took place on the 29th of February 1843: the creditor is less active; and for aught that appears, had the agreement not been entered into, the bill would have been paid.

In *Nichols v. Norris* (c) it was stipulated in the deed, that as the plaintiff held certain other securities, the arrangement should not affect those: there, too, the defendant was the maker of the note, and the case evidently went on that ground,—for Parke, J., interrupts the argument, and asks how the case is to be distinguished from *Fentum v. Pocock* (d) and *Carstairs v. Rolleston* (e)? *Ex parte Glendinning* (f) is distinguishable from the present, and can also be supported on the authority of *Fentum v. Pocock*; the bankrupt was there the accommodation acceptor, and the proof was on the estate of the drawer. Besides, the language of Lord Eldon only goes to this, “that if the creditor expressly stipulates “for the reservation of all his remedies against other parties, they shall “still remain liable.” *Boulton v. Stubbbs* (g) is a strong authority for the defendant.

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BRADY, C. B.

We are all of opinion that the plaintiffs are not entitled to recover the amount of this bill of exchange from the defendant. The Jury have

(a) 2 Bro. C. C. 579.

(b) 3 Br. C. C. 1; C. B. L. 6th ed. 168.

(c) 3 B. & Ad. 41, n.

(d) 5 Taunt. 192.

(e) 5 Taunt. 551.

(f) Buck. 517.

(g) 18 Ves. 20.

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found that a valid and binding composition was entered into by this instrument as between Daly and his creditors: they have also found, that the composition bills, in pursuance of the agreement contained in that instrument, were duly tendered within a reasonable time; and that consequently, so far as regards Daly, the plaintiffs are not entitled to proceed against him for any thing beyond the amount of the composition.

They contend, however, that as against Meighan his surety, they are entitled to proceed for the full amount of their demands; and they contend for this upon the grounds that Meighan was a party to the arrangement by which the composition was entered into, and that they especially reserved their right so to proceed as against the surety, by the words annexed to their signature to the composition agreement.

In order to test that right, it is necessary to consider the nature of this instrument. It is not a single instrument or deed of composition, such as is entered into in a case where there is a single debt and but one creditor, but it is a composition instrument made binding in law because of the community of interest between the persons who are supposed to concur in it, each relying on the acts of the others; or, in other words, it is an instrument of composition on the part of the general body of the creditors, in which we must presume each was more or less induced to concur, in consequence of seeing the signatures of the others.

At the time the instrument was signed, Daly was indebted to the plaintiffs in a certain sum, for which they held as security the drafts of the defendant Meighan on Daly; and the defendant consequently stood merely in the position of a surety. That being the case, a composition agreement was entered into, whereby the plaintiffs agreed to take a composition of 7s. 6d. in the pound, not to be secured by the bills of any third person, but by the acceptances of the very same individual who was already a surety for the full amount of their demand. The instrument whereby the composition was agreed to, was signed by Daly's creditors—some of them attached conditions to their signatures, others did not. The plaintiffs annexed to their signature a reservation or condition in the following words—"Without prejudice to any additional security we may hold."

Unquestionably, these words do not directly or explicitly refer to the security they held in the drafts of the defendant; but it is contended that they comprise every security, whether of the defendant or of a third person. When we, however, come to consider what would be the operation of such a construction upon this instrument, it will be difficult to follow that argument to the extent to which it would lead us.

In the first place, I may assume that every creditor who signed the agreement had a like security of the same Meighan for his demand; in that case the instrument would be *felo de se*; for it would be absurd to enter into an agreement with the principal to accept a part only of the

demand secured by a third person, retaining remedies against that same third person as surety for the same principal and for the same debt, upon which the principal could be rendered liable to the whole by suing the surety.

Taking the facts of this case as they are—viz., that plaintiffs did not happen to hold any other security than the defendant's drafts, at the time they entered into the arrangement for the composition, and that it does not appear that the other creditors held securities of Meighan,—what is the state of the case? The defendant, by that arrangement, to which the creditors were parties, makes himself responsible for their several demands to the extent of seven shillings and sixpence in the pound, for the purpose of getting rid of the commission of bankruptcy then pending against Daly.

The plaintiffs concur in that arrangement, and hold themselves out to the other creditors as consenting to take seven shillings and sixpence in the pound, to be secured by the drafts of Daly on Meighan; that is, that Daly is not to be liable to pay the composition in the first instance, but that Meighan is. Now, the other creditors may have inquired, and found Meighan to be a person sufficiently responsible to the amount of the composition; and, therefore, when the plaintiffs affixed that condition to their signature, they may have been considered by the other creditors as referring to other security than that of Meighan.

Besides, several of the creditors signed this composition agreement before the plaintiffs did so; and can the plaintiffs, thus coming after the other creditors, and without any communication with them, attach to their signature a condition reserving a right to proceed for twenty shillings in the pound of their demand?

It is true, they may reserve such a right as against all the world, except as against Daly or Meighan. As against Daly, it is clear they cannot do so; but can they do so against Meighan as the surety? If it were expressly and in terms stipulated in a written instrument between the plaintiffs, Daly and Meighan, that Meighan, notwithstanding the composition deed, should be liable on the original bills, I question very much whether such a contract would be lawful—at all events, it would give rise to a very serious question.

The words annexed to the plaintiffs' signature do not expressly, or in terms, indicate or include the original drafts of the defendant; and we will not infer, that the plaintiffs, in using those words, meant to retain his liability on those drafts for the full amount of their demands, when by the same instrument they have agreed to take his acceptance to secure a composition for part. A verdict must therefore be entered for the defendant.

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PENNEFATHER, B., and RICHARDS, B., concurred.

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LEFROY, B.

I should have thought it unnecessary to add any thing to what has already fallen from the Court, had I not, during the progress of the argument, been disposed to take a different view of this case from that which I now entertain. I was for some time at a loss to discover upon what ground the defendant had a right to resist the payment of this bill of exchange.

He has no right to do so on his own account, but from the very fact of his being a consenting party to the composition agreement, he must, on the one hand, be subject to all the consequences of it, while on the other, he is entitled to all the benefits which may arise from it.

Now, the principle of a deed of composition is this—the creditors agree to release and exonerate their debtor from all liability beyond the amount of the sum compounded for. And the principle of such an agreement, no creditor who is party to it can violate. All those who are virtually or actually parties to the deed are bound to give effect to its operation.

In the present case the plaintiffs were parties to the agreement for the composition, and they are now virtually violating the principle I have spoken of, by enforcing against Meighan the whole amount of their demand, because they thereby enable Meighan to turn round upon Daly, and eventually recover the entire amount from him.

The defendant, therefore, shall not be allowed to protect himself on his own account, but for the sake of Daly, whom the plaintiffs agreed to release from his liabilities and set up as a new man: thus giving them all a fair chance of his being able to pay the composition.

It is said, however, that the plaintiffs, with the knowledge of the other creditors, reserved a right to proceed upon these bills, and that it is consequently no fraud upon the composition deed, or upon the principle on which it is founded, that they should now proceed upon these bills. But have they reserved that right in the way the law allows? The reservation is not contained in the *body* of the instrument; but the plaintiffs when they come to sign it reserve this right, as they allege; the other creditors, however, signed it without seeing or being aware of the reservation.

Lord Eldon says, in *Boulbee v. Stubbs* (a), that such a right should be reserved in direct and explicit terms, and the reservation be contained in the body of the instrument, in order that all parties may see and be aware of it. But here, instead of this reservation being contained in the body of the instrument, and expressed in plain and explicit terms, it is only annexed to the signatures of the plaintiffs, and in language far from clear or unambiguous.

(a) 18 Ves. 22.

In this case, all the creditors have an interest in the composition deed, and in having it construed so as to keep Daly free from any liability exceeding the sum of seven shillings and sixpence in the pound. To increase his liability beyond that amount in favour of any one, it would have been necessary to have been with the concurrence of all the parties to the deed, and to have been ascertained by the use of clear and unambiguous terms, which it is sufficient to say were not used in this case.

Upon these grounds then, my mind has come to the conclusion that, the plaintiffs ought not to be permitted to recover the amount of these bills. And this, as I have already observed, not to protect Meighan, but to give effect to the composition deed into which the parties have entered.

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MR. J. LEAHY, for the plaintiff, moved to make absolute a conditional order that service of the *copias ad respondendum* in this case, upon the defendants resident in London, by serving D. Fitzgerald, their law-agent here, might be deemed good service.

The Court has authority, under 43 G. 3, c. 53, to order service of process to be substituted on a defendant resident out of the jurisdiction: and it is a question of discretion, depending on the particular circumstances of each case, whether the Court will make such order.

The present defendants, in Trinity Term 1839, had obtained a judgment against the plaintiff, as surety for a person named Smith. On the 22nd of September 1841, execution was issued against the goods of the plaintiff on foot of that judgment for over £550. In that execution, the attorney for the present defendants was D. Fitzgerald. The plaintiff filed a bill in this Court for an injunction, alleging equitable circumstances, which he said discharged him from his liability on foot of the judgment; and the three defendants appeared to that suit by D. Fitzgerald as their attorney. That suit was still pending. The present action was brought for maliciously issuing and overmarking the execution. D. Fitzgerald showed cause by affidavit, in which he stated that the defendants had been partners in trade, and so continued up to the 8th of April 1842, when their partnership was dissolved. That the defendant D. T. Johnson was appointed to wind up the affairs of the concern; and that he had, since the dissolution, separately carried on the business on

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his own account. That D. T. Johnson alone had, since the dissolution, employed D. Fitzgerald as his attorney; and that he, D. Fitzgerald, had, but once since the dissolution, had any communication with the other partners. That the execution in this case was issued on the written order of D. T. Johnson alone, upon a judgment which was for a partnership demand. That he, Fitzgerald, never got any directions as to the execution or the injunction suit from either H. Hurst or J. C. Johnson. That he once, in February 1842, saw H. Hurst in Birmingham, when he waited on him with a letter from J. C. Johnson, in order to procure his execution of certain deeds of assignment of property in Ireland; and that upon that occasion the equity suit was not alluded to. That he, Fitzgerald, saw J. C. Johnson in London and informed him of the equity suit; but that J. C. Johnson gave him no instructions as to it. That the defendants were not natives of Ireland, and had never resided there but for a few days at a time, when they were there on matters of business; that none of them had been in Ireland since the institution of the suit; and that he had no authority from any of the defendants to enter an appearance for them or act as their attorney.

In the injunction suit, an account had been directed to be taken of the sum due on foot of the judgment; and it was sworn that it appeared on taking the account, that £81 only remained due on foot of the partnership debt, for the security of which the judgment against the plaintiff had been obtained; and that the execution was issued in reality for a debt due by Smith to D. T. Johnson alone.

Mr. G. Fitzgibbon, Q. C. and Mr. J. D. Fitzgerald, for D. Fitzgerald, showed cause.

Several orders of the nature here sought have been made by the Court; but they passed *sub silentio*; and whenever the attention of the Court has been drawn to the matter, the order has been refused. Insurance cases and partnership transactions, when the application is made during the continuance of the partnership, are exceptions: *Nugent v. Williams* (a); *Pulteney v. Piers* (b). In *Rossiter v. Rossiter* (c) the defendant was actually moving in Court at the moment. In *Sadlier v. Smithwick* (d), *Farlie v. Quin* (e) and *Stevens v. The London Assurance Company* (f), the application was refused. Before the 43 G. 3, c. 53; the plaintiff might, in this Court, proceed by *capias quo minus*, attachment of privilege, or common law subpoena: 1 *How. Ex. Pl.* 14. Under the two first writs, the body of the defendant was to be arrested by the Sheriff; therefore, they must have been executed against a defendant

(a) 3 Law Rec. N. S. 275.

(c) Jo. & C. 149.

(e) Smy. 189.

(b) 1 Jo. 1.

(d) Cr. & Dix, A. N. 37.

(f) Al. & N. 29.

resident in the country; the last might be either served personally on the defendant or left for him at his residence; but that writ also only applied to persons resident in the country: for if the defendant did not appear to it, the next process was an attachment to the Sheriff. The 21 & 22 G. 3, c. 18, applies only to cases of parties within the jurisdiction. Upon the principle of international law, no Court has jurisdiction unless the defendant be within the local jurisdiction of the Court or the proceeding be *in rem*:—*Story Conf. of Laws*, 786; *Vattel*, B. 2, c. 8, s. 84. An English Court of Justice is bound to inquire into the grounds on which a foreign judgment has proceeded; and if it appears that the foreign Court had not jurisdiction, it will refuse to enforce its judgment: *Buchanan v. Rucker* (a); *Fergusson v. Mahon* (b); *Don v. Lippman* (c). In the last case, it is said that *Becket v. M'Carthy* (d) had gone to the very verge of the law. *Cowan v. Braidwood* (e) is to the same effect. In all those cases, the question was not whether the defendant had notice of the proceedings against him, but whether the Court had jurisdiction; and they show that before the 43 G. 3, c. 53, the Court had no power to substitute service on a person out of the jurisdiction; and there is nothing in that Act to give the Court such a power. The following cases were also cited:—*Chamberlayne v. County Fire Office Company* (f) and *Burke v. Quinlan* (g).

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Mr. *Leahy*, in reply.—This case comes within the principle of *Rossiter v. Rossiter*, which was followed in *Blake v. Browns* (h) and *M'Cullagh v. Sharpe* (i). So service was substituted in *Kennedy v. Walker* (k) and *Taylor v. Crane* (l). In actions upon foreign judgments the question is, whether the defendant had notice; if he had, the Court here will give effect to the foreign judgment, notwithstanding the defendant was not within the local jurisdiction of the Court. *Cavan v. Stewart* (m), *Gurney v. Hardenbergh* (n), and *Story Conf. of Laws*, 822, 343, were cited.

Cur. adv. vult.

BRADY, C. B.

In this case the conditional order was made by the Court to substitute service of the process against the defendants, resident in London, by serving them there, and serving their attorneys or law agent in this

(a) 9 East, 192.

(c) 5 Cl. & F. 1.

(e) 2 Sc. N. R. 138.

(g) 3 Ir. Law Rep. 310.

(i) 3 Ir. Law Rep. 260.

(l) 2 Law Rec. N. S. 195.

(n) 1 Taunt. 487.

(b) 11 A. & E. 179.

(d) 2 B. & Ad. 951.

(f) 2 Law Rec. N. S. 71.

(h) 2 J. & S. 681.

(k) 3 Law Rec. N. S. 54.

(m) 1 Stark. 525.

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country ; and that such service should be deemed good service. At the close of Term, I intimated to the parties that we were disposed to make the order absolute as to one of the parties, Daniel Turton Johnson, but not as to the other defendants.

The case is thus circumstanced :—The plaintiff, F. Phelan, executed a bond and confessed a judgment to the three defendants, as a security for a person of the name of Smith, who carried on business in Tralee. Upon that bond, judgment was entered up ; and some time since, in the course of last year, the defendants issued execution in this country against F. Phelan upon that judgment, marked for a sum exceeding £500. Phelan contended that he had an equitable discharge to the judgment, viz., that after this guarantee had been given by him, the defendants had dissolved partnership, and that the continuing partner was seeking to make the judgment available for a demand not due by Smith to the three partners, but only to one of them, namely, D. T. Johnson. To sustain that case, he filed a bill for an injunction ; and that cause proceeded, and in it accounts have been taken, and it has not as yet been finally disposed of, but is still pending in this Court. In issuing that execution, D. Fitzgerald was the attorney for the plaintiffs in it ; and in the defence to the injunction cause, he was also their attorney ; and the present motion is, that service of the process in this action should be substituted upon D. Fitzgerald. The present action is brought by Phelan against the three Johnsons for wilfully and maliciously overmarking the execution ; and the question is, whether we are authorised by law to substitute service of the writ in that action, having regard to the circumstances of the case ?

As to the defendant D. T. Johnson, the Court intimated their intention to pronounce the order ; as to the two others, we will not make the order. It will be sufficient for the purposes of the plaintiff if he gets judgment against D. T. Johnson. The other defendants have ceased to have any connection with D. T. Johnson ; they have dissolved partnership before the execution on the judgment issued ; and they are not parties to the transaction out of which the present action has arisen ; nor did they employ D. Fitzgerald as their attorney. These are the grounds of their exception out of this order. But as to D. T. Johnson, the question has been discussed at great length, and is of great importance to suitors in this country. The service sought to be substituted is that of a *capias ad respondendum*, the service of which is regulated by the 43 G. 3, c. 53 ; an Act of the Imperial Parliament. Before considering that Act, I think it right to advert to the current of legislation in England as to the service of process and enforcing appearances in that country ; and it is remarkable that there is no Act of Parliament in England authorising the Court, generally, to substitute service of process. There are several Acts on the subject. At the common law, in process by

original, there was a writ of *distringas*; and where there was tangible property in the country, the Court would lay hold of that property to compel an appearance, though the party was abroad. The cases upon this subject are summed up in *Tidd's Practice*: "Where the defendant residing abroad, carried on trade in England, a plaintiff might have proceeded, notwithstanding his absence, to compel an appearance by "*distringas* (a);" but that process only applied to tangible property in England. An Act of Parliament was passed to make that process more available, 51 G. 3, c. 124, s. 2, which contains a condition prior to the issuing the writ of *distringas*, viz., that it shall appear that the prior process had been duly served at the dwelling-house of the defendant; and, therefore, it did not apply where the defendant had not any dwelling-house in England.

The other process used in England for proceeding against parties who could not be served, was outlawry; and as to that, it has been decided, as well upon principle as upon the Act of Hen. 8, which requires the writ of proclamation to be issued to the Sheriff of the county where the defendant at the time of the exigent shall be dwelling, that the party must be in the kingdom at the time; and, therefore, that absence beyond the seas is cause for reversing an outlawry, even though the party went beyond the seas for the purpose of avoiding the service of process. It was so held in *Bryan v. Wagstaff* (b); and it is most important to bear this in mind in reference to proceedings in this country.

The Acts relating to the service of mesne process in England are the 12 G. 1, c. 29, and the 5 G. 2, c. 27. No powers are given by those statutes to substitute the service of process; in other respects they are analogous to the 43 G. 3, c. 53; but the first of them contains very remarkable words. It provides that, in all cases where the cause of action shall not amount to the sum of £10 or upwards, and the plaintiff shall proceed by way of process against the person, he shall not arrest the defendant, but shall serve him personally, *within the jurisdiction of the Court*, with a copy of the process. So that, in that Act there is no power to substitute service; and it is expressly required that the service be made within the jurisdiction. That being the condition of the law in England, the 43 G. 3, c. 53, *Ir.* is now to be considered. It is analogous to the 12 G. 1, and the 5 G. 2, *Eng.*, so far as those Acts prohibit arrest for sums under a specified amount, and in the mode of enforcing appearances. The third section of the 43 G. 3, c. 53, is that which corresponds with the second section of the 12 G. 1, c. 29; but it omits those remarkable words, "Within the jurisdiction of the Court." And that appears to have been done studiously. It is an omission deserving of

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(a) 1st vol., p. 112, 9th ed.

(b) 5 B. & C. 314.

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great observation, and calculated to raise serious questions as to what were the purposes of the Legislature in passing the 43 G. 3. Consequent on that omission, there is in the 43 G. 3, a special provision which exists in none of the English Acts; namely, the 8th section, which authorises the Court to substitute service of the process.* I apprehend, that for the last forty years—I may say, from the passing of that Act,—there has been a current of decision, in this Court at least, which I conceive has put this construction upon this Act of Parliament, that it warrants the substitution of service upon a party not bodily present in this country. In cases of actions upon policies of insurance, service of process has been from time to time substituted upon persons acting as agents of the Insurance Company and making this contract for them; and that course of practice, hitherto undisturbed by any authority or legal proceeding, has continued; establishing the existence of a power in the Court to act in substituting service of process upon persons not bodily present within the jurisdiction. So that it occurs to me, that taking the course and practice of this Court as one so long established, it really comes to no more than a question of discretion how far the Court will exercise the power given to it by the Act; and I think it has not unwisely considered that it had this power, having regard to the omission of those remarkable words in the 43 G. 3, and the introduction of the clause authorising the substitution of service into it. How far that modification of the English Acts was made in the 43 G. 3, by reason of the peculiar circumstances of this country, is not for me to consider. I may think it was designed to meet the circumstances of the country; but it is sufficient to say that there is no unsubstantial ground for the opinion that the Court originally was right in assuming that the Act gave them jurisdiction to substitute service on persons not bodily within the jurisdiction.

Treating it then as a question of discretion, how far has it been exercised? In the cases of policies of insurance, it has been exercised within a narrow and limited range, compatible with sound discretion. Service of process has been substituted in those cases upon the agent acting in reference to the particular subject matter of suit, upon a person through whom the Court was morally certain that the defendants would receive notice. So, another case has been decided in this Court, upon what I

* 43 G. 3, c. 53, s. 8.—“ Provided always, and be it further enacted, that whenever “ it appears to the Court out of which the process issues, that all due diligence has “ been used to have the process of the Court personally served, yet that under the “ special circumstances of the case, appearing to the Court by the affidavit of the “ plaintiff or his attorney, or the attorney employed for the purpose of having the pro- “ cess personally served, that it was impossible to procure personal service, that then “ and in such case it shall and may be lawful for the Court out of which the process “ issues, to substitute such other kind of service as to them shall seem fit.”

conceive to be the same principle: I allude to *Kennedy v. D'Arcy*, in which a conditional order of the 8th of June 1840, to substitute service, was afterwards made absolute. In that case, J. S. D'Arcy was the owner of property which was offered for sale through the agency of Mr. W. Gibson, as his attorney; and who acted as the agent and attorney of the vendor in the transaction; attended the sale; read the conditions of sale, and signed the agreement as the agent of Mr. D'Arcy. The plaintiff became the purchaser. A controversy afterwards arose as to the title; and in order to recover the deposit, Kennedy brought his action against D'Arcy. In the mean time, Mr. D'Arcy had left the country, but the Court made an order substituting service of the process on Mr. D'Arcy, by serving Mr. Gibson, his attorney; and we did that upon the same principle on which the Court has acted in actions on policies of insurance; that they were dealing with an agent similarly constituted by the party, as the agent in insurance cases is, in reference to the subject matter of the suit; and in whom the Court had perfect confidence that every act they did with regard to his principal, would be communicated to him, and that the agent had full power and authority to act on the subject.

In the present case, certain persons resident in England obtained a judgment in the Courts of this country; they give instructions to put that judgment into force—a controversy arises as to the sum really due on the judgment—and the Court, acting on the same analogy at the equity side of it, there being a bill for an injunction, makes an order—the common order in every Court of Equity,—that service of the subpoena on the attorney at law shall be good service on the defendant in equity. That is done in order to avoid and prevent a failure of justice, that the party should not have the benefit of a proceeding in the Courts of this country, without submitting to their jurisdiction in the subject matter of suit: and for the attainment of justice; and because of the necessity of the thing, Courts of Equity have from an early period held such service to be good. So in the case of a bill of discovery, the same rule applies. A different course of proceeding, in form but not in substance, is adopted in the case of cross bills: for stopping the proceedings in the original suit, until an appearance is entered in the cross suit, has the same operation. Then, in the case before the Court, the parties who obtained the judgment, having committed an act of gross injustice—for I am at liberty to assume that—having issued execution upon an Irish judgment by means of an Irish agent, say that they shall not be made answerable in the country in which they have done that wrong. This is a case in which there would be a great failure of justice, if there were no power in the Court to compel the party so acting to answer in this country for his actions. Many cases might be put, in which a person resident out of the jurisdiction might ruin others by means of the legal

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process of the Court, without risk to himself, unless the Court treated his agent to do wrong as his agent to do right also.

Since this case was discussed, a decision of an English Court has appeared, which has thrown great light on the subject as to the exercise of the discretion of the Court in cases of this nature ; for having come to the conclusion that the 43 G. 3 gives jurisdiction, it really comes to little more than a question of discretion in the Court. The case I allude to is *Hobhouse v. Courtney (a)*. In that case the subject was fully discussed, and all the cases were looked into ; searches were made in the Registrar's book ; and in the notes to that case are to be found a variety of cases, in all of which service was substituted by different Chancellors. In one of them, *Carter v. De Bruyn*, the statement in the order is, that the party employed an agent in England, to act in the matters contained in the bill. The Vice-Chancellor goes at length through the authorities, and lays down this principle—that when there is a special authority given to the party, then service will be substituted ; but that that does not apply to the cases of general agents, as general land agent or general law agent, or to an attorney for the party in another suit ; in regard to which we have already declared that we would not substitute service on such a person ; holding that the party merely suing in this country does not make his attorney in that suit an agent for him in this country for all purposes ; but when we had a party authorised to act in respect to the very subject matter of the suit, there we exercised a sound discretion in substituting service on him, being well assured that every step taken in the case would be intimated to the principal.

How far the plaintiff may make any judgment he may obtain in this case available, or whether he can make it available elsewhere than in Ireland, is not for us to consider : but having regard to the decisions in England, with respect to foreign judgments, I think it would be difficult for the defendant to contend successfully that a judgment here would not bind him there : for in all the cases we find that the question was not, whether in point of fact, the process was served upon the party ; but whether he had or had not notice, either actual or constructive, of the proceedings. I need not go through those cases. It appears to me, that in the exercise of our discretion, it is right, and a wholesome exercise of it, to substitute service of the process against the defendant D. T. Johnson on D. Fitzgerald.

PENNEFATHER, B.

The cases referred to in *Hobhouse v. Courtney* very distinctly show the power of the Court to examine the authority of the agent to appear, in the absence of the party to be affected by such examination. It

(a) 12 Sim. 140.

struck Lord Redesdale, in *Smith v. The Hibernian Mining Company* (a), that that examination could not take place in the absence of the party sought to be affected; and that was the difficulty which he felt: but it appears from the result of the search directed by the Vice-Chancellor, that for years that jurisdiction has been entertained; and the examination gone into, in the absence of the party sought to be affected by it, of the authority given by him, and of the likelihood and probability, amounting as it ought almost to a certainty, that the process would reach the principal. I think those authorities are quite satisfactory; and show that the question always is, whether in the exercise of the discretion of the Court in each particular case, the service of the process ought to be substituted; I entirely concur in the judgment of my Lord Chief Baron.

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LEFROY, B.

I may say, on behalf of the Court, that we feel greatly indebted to the Lord Chief Baron for the pains he has taken with this case. I would only make one observation as to the construction put by the Court upon the Act of Parliament; that I recollect Lord Redesdale saying that where the Court has been in the habit of putting a particular construction upon an Act of Parliament, and the Legislature have not interfered, it must be considered as the true construction of the Act. That fully justifies us in abiding by the course of practice which has obtained in this Court (b).

(a) 1 Sch. & Lef. 238.

(b) Vide *Noad v. Backhouse*, 2 Young & Col.; V. C. Rep. 529.

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Case.—The declaration stated that B. (the defendant), wrongfully, maliciously and without any probable cause, procured A. (the plaintiff) to be arrested and imprisoned under pretence of a decree for the sum of £10 debt and six shillings costs, theretofore obtained in the Court of the Assistant Barrister of the county of K., by the procurement of defendant, in the name of one C., but without the authority, consent or knowledge of said C., and to be kept and detained in prison for the space of six months.

CASE.—The second count of the declaration stated that the defendant, further contriving, and maliciously and wickedly intending to injure the plaintiff, on the 29th of January 1842, at, &c., wrongfully, maliciously, and without any reasonable or probable cause, procured the plaintiff to be arrested and imprisoned under pretence of a decree for the sum £10 debt and six shillings costs, theretofore obtained in the Court of the Assistant Barrister of the county of Kilkenny, by the procurement of the defendant in the name of one James Shee, but without the authority, consent or knowledge of the said James, and to be kept and detained in prison for a long space of time—to wit, for the space of six months then next.

Plea, the general issue.

The case was tried at the Kilkenny Summer Assizes 1843, before Mr. Serjeant Warren, when it appeared that the defendant had caused the plaintiff to be served with a civil bill in the name of one James Shee,

At the trial, it appeared that B. had caused A. to be served in the name of C., as the plaintiff therein, with a civil bill for “£20 due for timber and slates sold and delivered by C. to A., which A. promised to pay; and other £20 due on foot of an account stated and settled by and between C. and A., which sum A. promised to pay.” A decree was obtained thereon, “in the sum of £10 for timber and slates sold and delivered by C. to A.,” under which decree, B. procured A. to be arrested.

For the defendant B. it was contended that the civil bill was void, as it included two demands, which together exceeded the jurisdiction of the Civil Bill Court; that the decree founded thereon was also void; and that the action should, therefore, have been trespass and not case. *Held*, that (without deciding whether trespass would or would not lie), an action on the case might also be sustained, irrespectively of the question as to the validity of the civil bill process, inasmuch as the decree obtained thereon was for a sum within the jurisdiction of the Civil Bill Court; and as it was not competent to B. to avoid his own acts by setting up the nullity of the civil bill proceedings.

Quære.—Whether a civil bill can be maintained which includes several demands, separately within the jurisdiction of the Assistant Barrister's Court, but in the aggregate beyond it?

Semle.—That any objection arising from the excess of demand, apparent on the face of the civil bill, in such cases, may be obviated by varying the grounds of the demand, and including all in one sum, not exceeding the limit of the jurisdiction of the Assistant Barrister's Court.

Upon a motion in arrest of judgment, it having been objected that the above declaration was defective; first, because it contained no averment of a warrant having been granted by the Sheriff, under which the arrest took place; and secondly, because the decree was not alleged to have been obtained against the plaintiff in the present action; *Held*, overruling both objections; first, that the Sheriff was not bound to grant a warrant, and *non constat* but that he may have executed the decree in person; and secondly, that, after verdict, the Court was bound to intend that the decree proved at the trial was one obtained against the present plaintiff.

Quære.—Even if it appeared that the decree had been obtained against a third person, it might not have been so used against the plaintiff, as to enable him to maintain the present action against the defendant?

and had thereupon obtained a decree against him in the Assistant Barrister's Court for the sum of £10, under which he had the plaintiff subsequently arrested.

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The civil bill was in the following form :—

<p>" County of Kilkenney, " Division of Thomastown.</p>	<p>" By the Assistant Barrister at the Sessions " for the said county. The defendant is</p>
<p>" James Shee, of, &c. <i>Plaintiff;</i></p>	<p>" hereby required personally to appear before</p>
<p>" John Ryan, of," &c. <i>Defendant.</i></p>	<p>" the said Assistant Barrister, at Callan, in " said county, on the 10th day of January " next, to answer the plaintiff's bill in an action for the sum of £20 " sterling, due for timber and slates, sold and delivered by plaintiff to " defendant, commencing in the month of January 1841, and ending " March 1841, which sum defendant promised to pay ; and other £20 " sterling due on foot of an account stated and settled by and between " plaintiff and defendant, in the month of March 1841, which sum defend- " ant promised to pay ; or in default thereof the Assistant Barrister will " proceed as to justice shall appertain. Dated this 17th day of December " 1841. Signed on behalf of the plaintiff," &c.</p>

The decree thereupon obtained was as follows:—

<p>" County of Kilkenney, " Division of Thomastown.</p>	<p>" By the Assistant Barrister at the Sessions " for the county of Kilkenney. It appearing</p>
<p>" James Shee, of, &c. <i>Plaintiff;</i></p>	<p>" to the Court, that process to appear at this</p>
<p>" John Ryan, of," &c. <i>Defendant.</i></p>	<p>" present Session was duly served on the " defendant, and that the defendant is justly " indebted to the plaintiff in the sum of £10 British, for timber and slates " sold, and delivered by plaintiff to defendant from January 1841, to " March 1841 ; it is therefore ordered and decreed by the Court, that " the plaintiff do recover from the defendant the said sum, together with " six shillings British, costs ; and the several Sheriffs within this kingdom " of Ireland, are hereby commanded, notwithstanding any liberty within " their bailiwicks, to enter same and take in execution the body of the " defendant, to satisfy the said debt and costs. Dated at Callan this " 10th day of January 1842," &c.</p>

The defendant's Counsel called for a nonsuit, upon the ground that the form of the action should have been trespass and not case ; inasmuch as the civil bill was null and void, being for a sum exceeding the jurisdiction of the Civil Bill Court, and that no jurisdiction was averred or shown in any of the counts of the declaration, and that the decree founded on the said process was void.

The learned Judge declined to nonsuit the plaintiff, but took a note of the objection. The plaintiff's Counsel having stated they would rely on the second count of the declaration, the defendant went into evidence to rebut that adduced on the part of the plaintiff, after which the case was

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left to the Jury, who found a verdict for the plaintiff with £100 damages on the second count.

The defendant having in Michaelmas Term last, served a notice of motion to set aside the verdict and enter up a nonsuit, and also of a motion in arrest of judgment, the Court granted a conditional order that the verdict should be set aside and a nonsuit entered; and directed that so much of the notice as related to the motion in arrest of judgment, should be saved in the mean time.

Mr. *James Dwyer* now moved to make absolute the conditional order.—The civil bill having been brought for two sums of £20, which together amount to a sum exceeding the jurisdiction of the Assistant Barrister's Court, is utterly null and void: *Napier on Civil Bills*, by *Longf.* pp. 42, 156, 2nd ed.; *Pilkington v. Scott* (a); *McDonnell v. Yates* (b); *McDonnell v. O'Flaherty* (c). There is a very recent case in England, which is quite decisive on this point, *Dempster v. Purnell* (d). There the demand in the Inferior Court was similar to the consolidated money counts, viz., £1. 19s. 6d. for goods sold and delivered, and in £1. 19s. 6d. for money found to be due on an account stated—each being separately for a sum within the jurisdiction of the Inferior Court, but together amounting to a sum beyond it; and the Court held that, as in the commencement of the declaration, it was not limited to a sum within the jurisdiction, the proceedings were void. The civil bill process thus being void, the decree which is founded on it must be void also, and the action should therefore have been trespass and not case.—[PENNEFATHER, B. Assuming that the civil bill proceedings are void, and that the decree ought to have been reversed at the instance of the defendant in the Civil Bill Court, is it open to the party who actually obtained that decree, to say that the Court had no jurisdiction to pronounce it, and that it is therefore null and void?]
 —If the civil bill proceedings be void, the defendant cannot be precluded from insisting on their nullity.

Secondly, even if the Court should be against the defendant on the nonsuit point, the judgment must be arrested, as the second count, upon which the verdict has been taken, is too general, and is bad upon the face of it; first, because it does not aver that the Sheriff issued a warrant under which the plaintiff was arrested; and in the next place, because the decree therein mentioned is not averred to have been obtained against the present plaintiff; *non constat* that it may not have been obtained

(a) 1 Cr. & Dix. C. C. 460.

(b) Ir. C. C. 254; S. C. 2 Cr. & Dix. C. C. 232.

(c) Ir. C. C. 355.

(d) 4 Scott, N. R. 30; S. C. 3 Man. & Gr. 375.

against a third person; upon which grounds the second count is clearly defective: *Pippet v. Hearn* (a).

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Mr. *Lawson*, contra.—The declaration, without taking any notice of the civil bill process, states the decree which is admittedly valid, being for a sum within the jurisdiction of the Assistant Barrister's Court. If the objection taken to the civil bill in this case, on the authority of *Dempster v. Purnell* (b), be deemed well founded, the greater number of the civil bills in this country are equally defective. That case, however, is distinguishable upon this ground, that the promise there was a promise to pay the several sums of money in the declaration mentioned, which far exceeded the jurisdiction of the Court; but here the civil bill contains two distinct counts, with a separate promise in each count to pay the sum thereby demanded, such sum being one within the jurisdiction of the Civil Bill Court. Besides, had the objection been taken, the Assistant Barrister might have amended the civil bill, by striking out one of the two sums mentioned in the process, under the 35th section of the 6 & 7 W. 4, c. 75. If the civil bill were open to the objection, it does not follow that the decree is void; on the contrary, being for a sum within the jurisdiction, it is perfectly valid and free from objection; the action, therefore, has been rightly brought in case and not in trespass. But, even assuming the process and decree to have been both void, it does not lie in the mouth of the defendant here to take advantage of his own wrong and make himself a trespasser by showing that the decree, which was his own act, is a nullity: *Com. Dig. Action on the case*, A 3, which refers to *Bulwer's case* (c). In *Goslin v. Wilcock* (d), it was held that an action on the case lies for suing a party in an Inferior Court maliciously, and arresting him, even though the Court has no jurisdiction.—[PENNEFATHER, B. It does not appear from the report of that case, that any objection was taken on the ground of the action being in a mistaken form, but with that exception, it seems very much in point with the present.]—That case is the proper form of action appears from the following authorities: *Eless v. Smith* (e); *King v. Harrison* (f).

The COURT here called on the other side.

Mr. *M. O'Donnell*, for the defendant, in reply.—It is said that the

(a) 5 B. & Al. 634.

(b) 4 Scott, N. R. 30; S. C. 2 Man. & Gr. 375.

(c) 7 Coke, 4 b.

(d) 2 Wils. 302.

(e) 1 D. & R. 972; Chit. Rep. 304.

(f) 15 East, 612.

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second count of the declaration sets out the decree only and not the process, but the latter formed the foundation of the plaintiff's case, and was proved by him accordingly on the trial. As the Court of the Assistant Barrister was created by statute, the proceedings therein must be strictly conformable to the statutable enactments creating the jurisdiction, and the same rule is to be applied to it as to other Inferior Courts, namely, that every thing is to be presumed without its jurisdiction which is not proved to be within it. The case of *Dempster v. Purnell* (a) was a much stronger case than the present, for a bill of particulars was annexed to the declaration there, demanding a sum of £1 only, which was admittedly an amount within the jurisdiction of the Court. *Andrews v. Marris* (b) shows that the facts of the present case make it the subject of an action of trespass.—[PENNEFATHER, B. It is not necessary for us to decide that trespass would *not* lie.]—The 36 G. 3, c. 25, amounts to an express legislative declaration that the process is void unless brought for a sum within the jurisdiction of the Civil Bill Court; any decree pronounced upon it must, therefore, be invalid, and no act of the party can give validity to that which in itself is void. The authorities show that an action on the case is not maintainable: *Barker v. Braham* (c); *Elsee v. Smith* (d); *The King v. Danser* (e); *Case of the Marshalsea* (f); 1 *Chit. on Plead.* 210, 5th ed. In *Goslin v. Wilcock* (g), no objection appears to have been taken on the ground of a mistake in the form of action.—[PENNEFATHER, B. It can hardly be supposed that the objection would not have been taken either by Counsel or the Court, had there been any thing in it.]

Secondly, judgment should be arrested, as the second count upon which the verdict has been taken is so loosely drawn as to be bad even after verdict. It neither avers that the Assistant Barrister had jurisdiction, nor that the decree was obtained against the defendant in the present action; nor does it even contain an averment that the defendant was arrested under a warrant from the Sheriff. All these matters should have been stated in the pleading, and their omission renders the count substantially defective: *Robins v. Robins* (h); *Gadd v. Bennett* (i).

BRADY, C. B.

We think the objections taken by the defendant's Counsel are not

(a) 4 Scott N. R. 30.

(b) 1 Ad. & El. N. S. 3.

(c) 3 Wils. 368.

(d) 2 Chit. Rep. 304; 1 D. & R. 97.

(e) 6 T. R. 245.

(f) 10 Coke, 76, a.

(g) 2 Wils. 302.

(h) 1 Salk. 14; S. C. 1 Ld. Raym. 503.

(i) 5 Price, 540.

sustainable. To begin with the last, or those relied on as the foundation of a motion in arrest of judgment ; first, it is said that the second count contains no averment of any warrant having been issued under which the present plaintiff was arrested ; but such an averment is plainly not essential to the validity of the count, for this reason, that the Sheriff was not bound to grant a warrant, and *non constat* but that he may have executed the decree in person.

Again, it is said that the decree is not stated to have been obtained against the present defendant ; but if it be necessary that the decree should have been against him, we are bound after verdict to intend that the decree proved on the trial was one against the present defendant, or that it would not otherwise have been received in evidence by the Judge below. However, even if it were a decree obtained against a third person, it might possibly be so used as to injure the defendant here and give him a right of action ; but it is unnecessary for the reason already assigned, to decide that question in the present case.

There remains then the substantial question in the case ; and that is, whether on the facts proved below, the plaintiff is entitled to maintain an action on the case ; or, whether he was bound to bring trespass. Supposing the civil bill proceedings to be free from objection, it is not contended that the plaintiff could not maintain an action on the case ; but the proposition contended for is, that the civil bill on which the decree is founded is erroneous and void, and that the Assistant Barrister had not jurisdiction to entertain the case, because the civil bill or process contains two counts, or what is in the nature of such, the aggregate amount of the sums claimed by which, exceeds the jurisdiction of the Civil Bill Court. I do not feel myself called on to say, whether that is or is not a good form of process. Undoubtedly it has occurred to me to meet with many processes in that form ; but the case cited from 2 *Man. & Gr.* (a) is a very strong case and bears much upon the question, tending to show that such a form is objectionable. However, we are not, as I have already observed, now called on to discuss or decide that question ; for I will even assume, for the purpose of the argument, that the civil bill was bad as claiming a sum of £40, being a larger sum than could be entertained in the Civil Bill Court ; be that as it may, the decree obtained was within the limits of the jurisdiction of the Court. That is a decree which would furnish a justification to the officer who was called on to execute it ; neither the Sheriff nor his officer would be liable to an action for acting under it.

Then, what is the case put forward by the defendant here ? It is this, that he went before the Assistant Barrister and obtained a decree, which is perfectly valid upon the face of it, and that he maliciously put that

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(a) *Dempster v. Purnell*, 2 *Man. & Gr.* 375 ; S. C. 4 Scott, N. R. 50.

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decree in motion against the present plaintiff; but he now says, he is not to be liable in this form of action for the consequences of his misconduct, because the decree and the civil bill proceedings are totally null and void, the process, upon which they are founded, not being within the jurisdiction of the Civil Bill Court.

The case of *Elses v. Smith* (a) closely resembles the present. In that case it was held that falsely, maliciously, and without any probable cause, procuring the warrant of a Justice to search the premises, and apprehend the person of the plaintiff, on suspicion of felony, and thereby causing his premises to be searched, and his person to be imprisoned, was properly the subject of an action on the case, and not trespass; and that although it might be trespass in the Magistrate to grant an illegal warrant, yet it was case in the person who caused and procured such warrant to issue, if it was done maliciously and without reasonable or probable cause. The language of Bayley, J., in that case bears strongly on the circumstances of the present:—"If a party acts himself in apprehending another, he may be liable in trespass; but if he falsely, maliciously, and without any probable cause, puts the law in motion, that is properly the subject of an action on the case. With that all the authorities agree. The allegation in this case is no more than that the defendant did falsely and maliciously, and without probable cause, put the law in motion against the plaintiff. It is alleged, that he made a complaint before the Magistrate, in which he stated he had reason to suspect that several trees and parts of trees had been stolen from the King's Forest, and concealed on the premises of the plaintiff, and that he falsely and maliciously caused and procured the Magistrate to issue this particular warrant; which warrant states that the goods were suspected to be carried to, and were concealed in or near the premises of the plaintiff. The warrant is so framed in order to meet the possible case, that if the trees had been originally carried to the premises, they would be removed to some place near them, so as to be convenient within the reach of the party who originally concealed them.

"Now, if the defendant falsely and maliciously procured the warrant to be made, he caused and procured it to be made out in the way alleged. There is no positive allegation that the property had been stolen, nor need there be any to justify the warrant; for I take it to be quite clear, that it is not essential, in order to give the Magistrate jurisdiction, that the party should take upon himself absolutely to swear that a felony is committed; but if he states that he has just cause to suspect a particular person, and upon that representation a warrant is improperly granted,—that forms the foundation of an action in case; and it does not lie in the mouth of the party so acting, to say that the warrant is

(a) 1 Dowl. & Ry. 97.

“improperly granted. He makes the charge and he prevails upon the Justice to issue his warrant; and, upon that warrant being issued, he has no right to say, ‘I am not liable for the consequences, because, true it is, I caused and procured the Justice to issue his warrant, but the charge was not sufficient to authorise the Justice to do what I required him.’ I think that affords him no ground of defence.”

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On the principle furnished by that case, the present ought to be ruled. We do not decide that an action of *trespass* would not lie, under the circumstances existing in this case; but we decide that an action *on the case* also lies. There are many instances in which a party may maintain either trespass or case at his election. I will mention one case which seems a very strong one—*Moreton v. Hardern* (a). That was an action on the case against three defendants who were the proprietors of a stage coach. The declaration stated that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke his leg. It appeared in evidence that one of the defendants was driving at the time when the accident happened; and the Jury found that it happened through his *negligent* driving; and it was held that the plaintiff might maintain *case* against all the proprietors, although he might, perhaps, have been entitled to bring trespass against the one that drove the coach. Helroyd, J., there says:—“In cases where there is no ground of action, except the trespass, perhaps case will not lie; but where an actual damage has been sustained, the trespass may be waived, and an action is maintainable on the special circumstances of the case, as in *Pitts v. Gaince* (b). In trover the conversion may be the actual taking of the goods, yet there the trespass may be waived; and in other cases, that which is an aggravation of the trespass may be the subject of an action on the case.”

Now, the aggravation in this case was the unreasonable and malicious arrest of the plaintiff under pretence of the civil bill decree; that is, in fact, the part of the case which involves the gist of the action.

For these reasons, and without going further into the case, it occurs to us that there is no ground for saying that this ought to have been an action of trespass against the defendant, it not appearing that he was present at the time of the arrest.

PENNEFATHER, B.

It struck me early in the argument, that the grounds upon which the Chief Baron has put this case, directly applied to it; and that it did not lie in the defendant’s mouth to say—“I have done not only what the plaintiff charges me with, but I have done worse,—I brought the civil bill for a sum which was not within the Assistant Barrister’s jurisdiction;

(a) 4 B. & C. 223.

(b) 1 Salk. 10.

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"and now, when the plaintiff brings his action against me to recover compensation for the injury occasioned by my misconduct, I have a right to turn round upon him, and say—you have mistaken your remedy,—you should have brought an action of *trespass* and not an action on the case, as my proceedings were void *ab initio*." I think the defendant has no such right, and that the plaintiff may maintain an action on the case; and I conceive that the principle upon which such an action may be sustained is fully established by the authorities which have been cited.

With regard to the question, whether the civil bill is void or not—it is perhaps unnecessary that I should say any thing about it; but I may observe, that while, on the one hand, I should be sorry to say it was void—no case in this country having ever gone that length—(all the cases here having been cases of civil bills brought for one single sum exceeding the jurisdiction of the Civil Bill Court); yet, on the other hand, the case of *Dempster v. Purnell* (a) is certainly one deserving the most serious consideration; and we would therefore be unwilling to pronounce any opinion in favour of the form of civil bill adopted in this case.

I may add, that in framing civil bills in cases of this kind, the objection may, perhaps, be obviated by varying the grounds of the demand, but including all of them in one sum—and that a sum within the jurisdiction of the Assistant Barrister. In that way, the plaintiff would have all the benefit arising from the statement of several causes of action, without subjecting himself to the objection arising from the want of jurisdiction.

RICHARDS, B., and LEFROY, B., concurred.

The cause shown against the conditional order allowed with costs;
 and the motion in arrest of judgment refused without costs.

(a) 4 Scott, N. R. 30; S. C. 2 Man. & Gr. 375.

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BRENNAN v. MONAHAN.

Jan. 16, 18.

ASSUMPSIT by the indorsee against the maker of a promissory note. Pleas, the general issue, and the Statute of Limitations.

Replication to the second plea, *precludi non*, "Because, he says, that
 "within six years next after the said several causes of action in the said
 "declaration mentioned accrued, and each and every of them did accrue
 "to the said plaintiff, to wit, on the 13th day of June 1836, in the sixth
 "year of the reign of his late Majesty King William the Fourth, the
 "said plaintiff sued and prosecuted out of the said Court of his said
 "Majesty of his Exchequer at the King's Courts, Dublin, a certain
 "writ of his said Majesty the late King, called a *capias ad respondendum*
 "directed to the Sheriff of the county of Meath, against the said defend-
 "ant at the suit of the said plaintiff, by which said writ the Sheriff of the
 "said county of Meath was commanded to take said defendant if he
 "should be found in his bailiwick, and him safely keep so that he should
 "have his body before the Barons of his said Majesty's Exchequer at
 "the King's Courts, Dublin, on Monday the 21st day of November
 "then next coming, to answer the said plaintiff, his said late Majesty's
 "debtor, in a certain plea of debt, and that the said Sheriff should have
 "then there that writ; which said writ afterwards and before the
 "delivery thereof to the Sheriff of the said county of Meath as here-
 "inafter mentioned, to wit, on the 13th day of June, in the year of our
 "Lord 1836, at Castle-street, in the county of the city of Dublin, was
 "duly marked and endorsed for £290. 10s. sterling debt, and £3. 10s.
 "for costs; and being so marked and endorsed afterwards before the
 "return thereof, to wit, on the day and at the place last aforesaid, was
 "delivered to H. M., who then and from thence until and at and after
 "the return thereof was Sheriff of the said county of Meath, to be
 "executed according to law; and afterwards, to wit, on the return day
 "of the said writ, on the 21st day of November 1836, in the Court of
 "his said Majesty of his Exchequer at the King's Courts, Dublin, came
 "the said plaintiff by W. P., his attorney, and offered himself against
 "the said defendant in the plea and bill aforesaid; and the said Sheriff
 "of the county of Meath, to wit, H. M., Esq., at that day returned to
 "the said Court that the said defendant was not found in his bailiwick,
 "nor did the said defendant come or appear in the said Court of his said
 "Majesty before the Barons of his said Exchequer according to the
 "exigency of the said writ; whereupon the said plaintiff prayed another
 "writ of his said late Majesty to be directed to the Sheriff of the said

To a plea of the Statute of Limitations, plaintiff replied a writ sued out with continuances. After stating the defendant's appearance to the last writ, the replication contained a *prout patet* in the following form:—"As by the record and proceedings thereof remaining in the Court of, &c., may more fully and at large appear." Rejoinder, that there was "not any record remaining in said Court, in manner and form as plaintiff had in his replication alleged." Held, on special demurrer, that inasmuch as the several proceedings set forth in the replication, constituted but one record, the rejoinder was sufficient in law.

Quare, if the replication was bad on general demurrer as not having been framed in compliance with 3 & 4 Vic., c. 105, s. 7?

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"county of Meath in form aforesaid; and it was granted to him returnable before the Barons of his said late Majesty's Exchequer at the King's Courts, Dublin, on the 11th day of January, in the year of our Lord 1837, for the said defendant to answer the said plaintiff in the plea aforesaid; the same day was given to the said plaintiff there, and soforth; at which said day, that is to say, on the 11th day of January, in the year of our Lord 1837, before the Barons of his said late Majesty's Exchequer at the King's Courts, Dublin, came the said plaintiff by his attorney aforesaid, and offered himself against the said defendant in the plea aforesaid; and the Sheriff of the county of Meath did not send the said last mentioned writ, nor did he do any thing thereupon, nor did the said defendant come or appear before the Barons of his said late Majesty's Exchequer at the King's Courts, Dublin, according to the exigency of the said writ; whereupon the said plaintiff prayed another writ," &c.—[After stating the intervening continuances by *vice comes non misit breve*, the replication proceeded as follows]:—"Whereupon the said plaintiff prayed another writ of our said Lady the Queen, to be directed to the Sheriff of the county of Meath in form aforesaid, and it was granted to him returnable before the Barons of her Majesty's Exchequer at the Queen's Courts, Dublin, on the 10th day of January, in the year of our Lord 1843, for the said defendant to answer the said plaintiff in the plea aforesaid; the same day was given to the said plaintiff there and soforth; at which said day, that is to say, on the 19th day of January in Hilary Term, in the sixth year of the reign of Queen Victoria, before the Barons of her Majesty's Exchequer at the Queen's Courts, Dublin, came the said plaintiff by Henry Hassett Steele, his attorney; and the same day, to wit, the 19th day of January, in the year of our Lord 1843, the said defendant by Richard Alexander Walker, his attorney, also came according to the exigency of the said writ; as by the *record* and proceedings thereof remaining in the Court of our said Lady the Queen of her Exchequer at the Queen's Courts, Dublin, more fully and at large appears." Averment, that the said writs were sued and prosecuted by the plaintiff against the said defendant, with intent to implead the said defendant upon and for the said several causes of action in the said declaration mentioned, &c.; and that the said several causes of action in the declaration mentioned accrued to the plaintiff within six years next before the issuing of the said first mentioned writ, &c.—
Verification.

Rejoinder, "That there is not any *record* remaining in the said Court of our said Lady the now Queen of her said Exchequer, at the Queen's Courts, Dublin, in manner and form as the said plaintiff hath above in his said replication alleged, wherefore the said defendant prays judgment," &c.

Special demurrer, assigning as causes, that the rejoinder was vague and uncertain, for that there being several records alleged, averred or referred to, in and by the replication, it did not in any way appear in or by the rejoinder, which one of the said records was traversed or denied by the rejoinder; and also for that it did not appear in or by the rejoinder whether the defendant thereby traversed and denied the record of the several writs in the replication referred to, or any of them, or whether the defendant, by his rejoinder traversed and denied the record of the appearance of the defendant as in the replication also averred; and also that the rejoinder was double and multifarious, and that several matters, that is to say, the records of the several writs in the replication mentioned, and the record of the appearance of the defendant in the replication also mentioned were thereby put in issue; and also, that the replication did not tender any material issue.

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Mr. *Maley*, in support of the demurrer.—Each writ stated in the replication is a separate record: *Mulhall v. Palmer* (a); and so is the appearance of the defendant: 1 *Tidd*, 239, citing *Cro. Eliz.* 466. The *prout patet per recordum*, at the conclusion of the replication refers to the record of the defendant's appearance, which is the immediate antecedent. If it be meant by the rejoinder to put merely the record of the appearance in issue, it is bad as tendering an immaterial issue; but if it be intended to put the records of the several writs in issue, the rejoinder is bad, as it does not appear with certainty which of the writs is traversed. Upon both grounds, the demurrer is sustainable.

Mr. *J. F. Walker* and Mr. *Napier*.—The demurrer assumes that there are several records comprised in the replication, which is not the fact, as the first writ when returned, and all the writs *per continuance*, together with the defendant's appearance to the last writ, form one single record, and as such are traversed by the rejoinder of *ul tial record*. The *prout patet per recordum* refers back to all the proceedings previously stated in the replication. It is one entire record, and the whole is necessary for the plaintiff's case: *Smith v. Bower* (b); *Dickenson v. Teague* (c); in the latter of which cases Parke, B., treats the roll as an entire record, not to be contradicted.

Secondly—It is contended that the averment at the end of the replication, "as by the record and proceedings," &c., merely avers the record of the appearance to the last writ: if that be the case the replication is bad in not showing by positive averment that the first writ, which was

(a) 2 Fox & S. 67.

(b) 3 T. R. 664; see *Harrington v. Taylor*, 15 East, 383.

(c) 1 C. M. & R. 241.

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Each. of Pleas. at all, or in such a manner as to ground an award of writs *per continuance*
 BRENNAN by the Court: *Harris v. Woolford* (a); *Atwood v. Bir* (b); *Gregory v.*
 v. *Hurrill* (c); *Stanway v. Perry* (d); *Brown v. Babington* (e).
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Thirdly—Under the old law, and before the enactment of the 3 & 4 Vic. c. 105, s. 7, continuances were a mere fiction, and were not entered on the roll until after they were pleaded; but since the Act of Parliament came into operation the case is otherwise; and the present replication is bad for not showing that the requisites pointed out by the 7th section have been complied with.

Cur. adv. vult.

BRADY, C. B.*

This demurrer must be overruled. It is unnecessary for the Court to decide the question as to whether the replication is bad upon the ground of not having complied with the terms of the statute,† as we are all of opinion that the various proceedings enumerated in the replication constitute but one record, and that the rejoinder is good in law.

Demurrer overruled.

(a) 6 T. R. 617.

(b) 7 Mod. 3.

(c) 5 B. & C. 352.

(d) 2 Bos. & Pul. 158.

(e) 2 Ld. Raym. 830.

* The judgment is given *ex relatione* J. F. Walker, Esq.

† 3 & 4 Vic. c. 105, s. 7, *et vide* 10 M. & W. 174.

NOTE.—The learning on the subject of writs issued and returned, and writs “per continuance” grounded thereon, with the view of preventing the Statute of Limitations operating as a bar in civil actions is involved in some obscurity; nor can much light be thrown upon the subject from an examination of the authorities or books of practice.

It appears that, under the law as it existed both in this country and in England previously to the passing of the Act 2 W. 4, c. 39, *Eng.*, and the 3 & 4 Vic. c. 105, s. 7, *Ir.*, writs “per continuance” were a mere fiction, and not entered on the roll until the plaintiff in an action had prepared his replication to a plea of the Statute of Limitations; that they were then entered on a roll by the plaintiff's attorney, in order to connect by a chain of apparently legal proceedings the first writ with that to which the defendant had appeared. In pleading, it was necessary to aver the award of continuances by the Court each Term, based upon the Sheriff's return of *non est inventus*; and these continuances should be shown to be connected with the first writ, which should be averred to have been duly returned into the Court from whence it issued, and filed of record. It seems clear that a general averment at the end of the replication, “as by the record and proceedings thereof remaining in the Court, &c., may appear,” is sufficient in pleading: *Harrington v. Taylor* (15 East, 378); *Bottle v. Wood* (2 Keb. 46); 2 *Richd. Prac. K. B.* p. 86, and 3 *Chitty PL.* p. 1153, 5th ed.

In evidence, however, it seems that such would not have been sufficient, even under

the old law, without showing that the first writ had been regularly filed, with the Sheriff's return thereon in time, so as to give colour for the award of continuances, although the latter were prepared in the fictitious manner before mentioned: 2 *Arch. Proc.* 922, 7th ed., and cases there; *Harris v. Woolford* (6 T. R. 617); *Gregory v. Hurfill* (5 B. & C. 352); *Stanway v. Perry* (2 Bos. & Pull. 158.)

The first writ when returned and filed, together with any writs "per continuance" subsequently issued, and even the appearance to the last writ, form, when taken together, but one record, and should be so averred in pleading, constituting as they do one connected proposition or allegation, comprising several distinct parts which, when taken together, form a perfect and complete answer to a plea of the Statute of Limitations: *Brennan v. Monahan*, supra, and see the cases of *Robinson v. Raley* (1 Bur. 316); *Selby v. Bardons* (3 B. & Ad. 2); *Purden v. Dickson* (2 Ir. Law Rep. 351); and as such, the entire record so constituted may be traversed by a rejoinder in the nature of a plea of *nul tiel record*.

If the argument that in the replication in the principal case there are several records alleged, were well founded, it is clear that the averment of each should be concluded with a "*prout patet per recordum*;" for after pleading the several records, to say at the end of all, "*prout patet per recorda severalia predicta*," would be bad: per 2 Justices, 2 Cro. 626; and *Com. Dig. Plead.* vol. 6, p. 128.

It is presumed that the intention of the Legislature in framing the enactment of the 3 & 4 Vic., c. 105, s. 7, was to guard against the silent and secret operation of "writs per continuance," invested as they were, before the passing of the Act, by the then existing state of the law, with the semblance of reality, though in point of fact, they were an acknowledged fiction. By the 7th section of this statute it is enacted, that "in order to prevent the operation of any Statute of Limitation in bar of the cause of action of any plaintiff in cases in which such cause of action would be barred unless a writ of process issued and was continued for that purpose, every writ or process may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested or held to bail thereunder or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested or held to bail thereunder or served therewith, or proceeding to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus* and entered of record within one calendar month after the expiration of the return of such writ or process, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one calendar month after the expiration of the preceding writ, and shall contain a memorandum endorsed thereon or subscribed thereto specifying the day of the date of the first writ, such return of *non est inventus* to be made in bailable process (in case such bailable process shall be ordered to issue as aforesaid) by the Sheriff or other officer to whom such writ shall be directed, or his successor in office, and in process not bailable, in case of non-service thereof, to be made by the plaintiff or his attorney suing out the same, and signed by him, and in case such bailable process shall be so returned *non est inventus*, then for such purpose of preventing the operation of such Statute of Limitations the same may be continued by alias and pluries writ not serviceable, to be continued and returned in manner aforesaid." By this enactment, the mischief which prevailed under the law as it stood before the passing of the Act, has been removed, and the debtor by a search in the proper office, is enabled to ascertain whether there are on record any writs filed for the purpose of keeping alive a demand against him, and preventing the Statute of Limitations operating in his favour.

The fiction of continuances being thus abolished, and the Legislature requiring

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H. T. 1844. *Exch. of Pleas.* an actual entry on record of the returns of writs per continuance, to prevent the running of the Statute of Limitations, it is submitted that the replication in the principal case is bad on general demurrer, on the ground of not showing a compliance with the requisites of the statute, at least since the statute came into operation in November 1840, and thus being no answer to a plea of the Statute of Limitations under the existing state of the law.

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SHEGOG v. MURPHY.*

Jan. 29.

Venue changed upon terms, from the county of L. to the city of Dublin, in an action of covenant, before issue joined, upon an affidavit of the defendant, that it would be necessary for him to examine on the trial several witnesses, all of whom resided in Dublin, and some of whom were medical men in practice there; defendant undertaking to pay plaintiff's extra costs of bringing from L. to Dublin a person who was sworn to be a material witness for the plaintiff, if on the trial he should appear to be so; also undertaking to rejoin gratis, and take short notice of trial.

THIS was an action of covenant on an indenture of apprenticeship, upon the defendant's covenant to teach the plaintiff his profession of apothecary, and to provide him with board and lodging, &c. The defendant pleaded *non est factum* and another plea, but issue had not been joined.

Mr. *Courtenay*, for the defendant, moved to change the venue from the county of Louth to the county of the city of Dublin, on a special affidavit stating that the cause of action arose in Dublin, that it would be necessary for the defendant to examine several witnesses at the trial, and that all such witnesses resided in Dublin; that some of them were eminent medical men in practice in Dublin, and others were connected with the Apothecaries' Hall, and that it would be necessary for him to examine a great number of apothecaries in proof of the custom of that profession.

Mr. *Trevor*, for the plaintiff.—Issue not having been joined, the motion is premature: *Weatherby v. Going* (a); *Youde v. Youde* (b). The plaintiff has made an affidavit, by which he offers to admit the execution of the indenture, and the purport of the evidence of the witnesses from the Apothecaries' Hall and College of Surgeons; he further states, that a person whom he is advised and believes to be a most material and indispensable witness for his case resides in the county of Louth. Where all the witnesses on both sides do not reside in the place to which the venue is sought to be changed, the motion will not be granted: *Jenkins v. Hutton* (c); *Watson v. Kennedy* (d).

(a) 3 B. & C. 552.

(b) 4 Dowl. P. C. 32.

(c) 7 B. Moore, 520.

(d) 3 Ir. Law Rep. 214.

* *Ex relatione.*

Mr. Hamilton Smythe, in reply.—The case of *Watson v. Kennedy* (a) is distinguishable from this case.

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BRADY, C. B.

The practice of this Court has not been that stated by the Court of Queen's Bench in *Watson v. Kennedy*.

Let the venue be changed, the defendant undertaking in any event of the cause to pay the plaintiff's extra expenses in bringing G. A. to Dublin to be examined as a witness on the trial, if the said G. A. should appear on the trial to be a material witness; defendant to rejoin gratis if necessary, and to take short notice of trial; and plaintiff's costs of this motion to be costs in the cause.

(a) 3 Ir. Law Rep. 214.

1845.
H. of Lords.

In the House of Lords.

JACK, Lessee of DAWSON,

v.

M'INTYRE and WIFE.

April 8.

(In Error from the Queen's Bench and Court of Error.)

By a lease bearing date 1719, the lessor granted "All that part of the townland of B. containing five hundred and nine acres of arable, meadow and pasture, for three lives renewable forever; bounded on the south by Derrygarree, on the north and east by Lough Neagh, and on the west by Tough's and Wallwood's lands, lying and being, &c., with all and singular the rights, members, privileges, advantages, easements and appurtenances thereto belonging, excepting and reserving all mines, minerals, and quarries of stone, coal, escheats, waifs, estrays, deodands, courts leet and courts baron, seneschalships, and all other royalties, privileges, muniments and franchises whatsoever; with liberty of hunting, fishing, &c., and excepting and reserving all timber and wood above or *under ground*, with liberty to dig for and carry away the same." It was proved that part of the said townland of B., called Tough's and Wallwood's lands, was in possession of a third party, and that a portion was held by the lessor of the plaintiff in his own possession. *Held*, affirming the judgment of the Queen's Bench and Court of Error in Ireland, that a large quantity of bog, which lay within the boundaries of the demise in the said lease, passed thereunder, in addition to the five hundred and nine acres of arable, meadow, and pasture land.

"his heirs and assigns, with liberty to him and them to cut, dig for, and "carry away the same, freed and indemnified from all manner of "trespasses." He then gave in evidence several renewals of that lease, down to the renewal under which the defendant held. The lessor of the plaintiff also produced the agent of the Castle Dawson estate, who proved that he had been agent for that estate since the year 1819; that he was acquainted with the townland of Ballymagaigan, and that it is part of the Castle Dawson estate; that it contains nine hundred and four acres, exclusive of portions held by Mr. Groves, which are called Tough's or Wallwood's Land, and of a portion held by the lessor of the plaintiff in his own possession; that the defendant was in possession of nine hundred and four acres and upwards, and that in said nine hundred and four acres there was a large quantity of bog, of cut-out bog and moss, and that the bog possessed by the defendant was nearly enclosed by arable, except on the side bounded by Tough's Land; on that side it is all bog, excepting a small space between the road and the river, and that the bog on that side came down to Lough Neagh; and that all the bog claimed by the lessor lay within the boundaries of the lease of the 13th of August 1719, and the respective renewals thereof; and that the family of the defendant had liberty of cutting turf on the bog, and that there were frequent disputes amongst the tenants about the bog.

The defendants offered several leases in evidence, made by them, of portions of this bog, to prove possession accompanying same; but these leases were rejected by the learned Baron; to which opinion of his Lordship, Counsel for defendant objected, and closed their case. Counsel for plaintiff then called upon his Lordship to direct the Jury to find a verdict for the plaintiff, which he refused to do, but gave as his opinion, that the whole of the land, moss, bog, and cut-out bog, which lay within the boundaries of the premises demised by the said lease of the 13th of August 1719, passed to the lessee and those deriving under him; and that if the Jury believed that the bog and premises claimed by the present ejectment lay within the ambit of the boundaries of the demised premises, the defendant was entitled to a verdict, and with that declaration left the case to the Jury; whereupon, Counsel for the plaintiff excepted to the opinion and directions of the learned Baron, on the ground, that according to the terms and true construction of the lease of the 13th of August 1719, nothing passed to the lessee, save and except five hundred and nine acres of land, arable, pasture, and meadow. The Jury found a verdict for the defendant.

The bill of exceptions was argued before the Court of Queen's Bench in Ireland in Michaelmas Term 1840, when judgment was given for the defendant, overruling the exceptions (a). The case was afterwards argued

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(a) 3 Ir. Law Rep. 140.

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before the Court of Error in Ireland, in Michaelmas Term 1842, on which occasion, the judgment of the Court of Queen's Bench was affirmed (a). The case now came before the House of Lords on a writ of error, brought to reverse the said judgments of the Court of Queen's Bench and Court of Error.

Mr. John W. Smyth and *The Solicitor-General*, for the plaintiff in error.

Counsel for the defendant in error were not called on.

The LORD CHANCELLOR.

My Lords, if we entertained any doubt with respect to the construction of this instrument, I should think it necessary to recommend your Lordships to hear the Counsel on the part of the defendants in error; but as the noble and learned Lords here present do not appear to entertain any doubt, I think we are in a position now, upon the arguments on the part of the plaintiff in error, to recommend to your Lordships to affirm this judgment.

My Lords, if there were any inconsistency between the description of this property, which is the subject of the lease, in the different parts of the lease—if it were necessary to select one part, and to reject another, then we might find it necessary to refer to the rules which have been laid down for the purpose of guiding the judgment of the Court in cases of this description. But, it does not appear to me that there is any inconsistency whatever between the different parts of this description. It is a demise of all that part of the testator's lands, bounded in a particular way. The boundaries are minutely, and as we must take it, correctly described. All the lands, therefore, contained within those boundaries, would pass, unless there was some inconsistency between that description and the other part of the instrument.

Now, what is the inconsistency, or the supposed inconsistency, which is relied upon? The passage in which it is stated that it contains "five hundred and nine acres, arable, meadow, and pasture?" It does contain "five hundred and nine acres, arable, meadow, and pasture;" and because it has not gone on to describe that it also contains a quantity of bog—four hundred acres of bog—which, at that period, was considered as property of little or no value, it is said that that part of the description is inconsistent with the rest.

It does not appear to me that it is in the slightest degree inconsistent with it. It is a demise of all that part of the townland, particularly described with respect to its boundaries, containing so much arable,

(a) 5 Ir. Law Rep. 329.

meadow, and pasture ; but also containing a considerable quantity of land of another description, which, at that time, was considered of little or no value. It does not appear to me, therefore, that there is any inconsistency in this description. On the contrary, it is perfectly consistent. And therefore, I am of opinion, that all that is contained within the ambit, according to the decision of the Court below, would pass to the lessee under this lease. I am of opinion that the judgment should be affirmed.

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LORD BROUGHAM.

My Lords, in this case, I entirely agree with my noble and learned friend, for the reasons he has shortly and satisfactorily given.

This case comes before your Lordships by a writ of error from the Exchequer Chamber, before whom it was brought by error from the Queen's Bench in Ireland ; before which Court it came upon a bill of exceptions to the direction of the learned Judge at the trial. That learned Judge put it to the Jury to say, whether they believed that the acres of bog for which the ejectment was brought, and which were in question, and alone in question, were within the ambit of the boundaries. If they believed they were in point of fact within the ambit of the boundaries, his Lordship directed that they should find for the defendants, and if otherwise, for the lessor of the plaintiff. The Jury being of opinion that they were, found for the defendants. The exception taken was, that the learned Judge ought not so to have left it, but that he ought to have directed the Jury, in construing the written instrument, upon which it was his province to put a construction, that the five hundred and nine acres of arable, meadow, and pasture, alone passed by the demise. That, therefore, raised the question whether or not the bog passed, being within the ambit of the boundaries ; or whether the demise only passed the portion of the land which is given by admeasurement, as well as by metes and bounds, namely, the five hundred and nine acres.

I agree entirely with my noble and learned friend, that if there be inconsistent constructions set up, and the question is, which satisfies the words, I should then be called upon to select ; and then the rule is undeniable, that you prefer that construction, unless there are some peculiarities in the case to take it out of the general principle and rule ; you prefer that construction which satisfies the whole, to that construction which only satisfies a part.

But that is not the case here. I am not put to any election ; and I am not called upon to make any such selection of construction, because this construction most undeniably is perfectly consistent with the very strictest words of the description of the parcels. It is " All that part of the town-land, containing five hundred and nine acres, arable, meadow, and pasture, bounded upon the south," and so on.

In the first place, this land is bounded as there described ; the external

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boundary is so and so—it is within that ambit. That the Jury found, and that is not denied. In the second place, it does contain five hundred and nine acres, arable, meadow, and pasture. Therefore, although it may contain more of townland within the ambit, or contain bog besides, it answers the description just as much, with respect to the admeasurement, as it does with respect to the boundary.

I cannot avoid looking at the concluding part of the Lord Chief Justice's observations, who presided in the Court from which this writ of error is immediately and last brought—I mean the Exchequer Chamber in Ireland; for he states (which we must take to be within the knowledge of the learned Judges, and that they all know it as a matter of common notoriety in Ireland), “there never was any measurement of bog at the “period of the lease in question being granted (1719); it being the “usual practice” (now, this is a matter of conveyancing, and a matter known to the learned Judges locally in that part of the United Kingdom), “to allow the bog to pass with the profitable land, described in this “instrument as arable, meadow, and pasture. It passed by the law of “forfeiture in all the grants of the forfeited estates; and that law was in “full force at the time of this lease being executed,” nearly a century and a quarter ago. That very much, in my opinion, goes to confirm the view taken by their Lordships in both of the Courts below; and unanimously, as it appears, in those Courts.

Such being the ground of the opinion at which I have arrived, in common with my noble and learned friend, it is unnecessary for me to go into the cases, such as *Doe* on the demise of *Ashforth v. Bower*, 3 Barn-wall & Adolphus, 453; because we do not touch those cases; we leave them entire; we entirely admit every part of the learning in those cases, only saying that they do not rule the present case; and this case stands consistently with those authorities.

I therefore wholly agree with my noble and learned friend, that there is no necessity for calling upon the defendants in error in this case; and that the judgment must be against the plaintiffs in error.

LORD CAMPBELL.

My Lords, I agree with the opinion of my noble and learned friends who have preceded me, that in this case it is unnecessary to call upon the Counsel for the defendants in error.

We are not driven to apply the maxims of law upon this subject, or to be governed by any of the technical rules which have been laid down for the construction of grants, in which inconsistent and contradictory language is used. When I look to this lease, I must put upon it its natural and grammatical construction; and doing so, I have no doubt that it comprehends the place in question, namely, this bog. I read it (as do my learned and noble friends who have preceded me) as a demise

of "all that part of the townland of Ballymaguigan, containing six hundred and nine acres, arable, meadow, and pasture, English statute measure." That is all perfectly correct. But why is not all that part of the townlands of Ballymaguigan, which is bounded by the boundaries that are here set out, comprehended in this demise? The only argument is this, that there is bog, and that the bog is not specifically mentioned, and the admeasurement of the bog is not mentioned; but of that there is abundant explanation given, that it was of so little value that there was no occasion whatsoever to mention the bog, or to mention the contents of the bog. It was included in that part of the townland of Ballymaguigan, which was comprehended within the line that is specifically pointed out.

Now, I think it is extremely important to observe, that there is no internal boundary. It would have been the easiest thing in the world, if the bog was not to be included, and it would have been the natural thing to have said, that it was bounded on the outside of Ballymaguigan, &c., and on the inside by the bog. But, on the contrary, there is no such intimation; and therefore, all that is included within that external boundary must pass by the demise.

Therefore, I have no doubt at all, that according to the natural and grammatical construction of the words in this case, the bog passed by the demise. I conceive there is nothing to rebut that rational construction; because the defendant, the lessee, is in possession, and there is nothing to show that he, and those under whom he claims, have not been in possession ever since the year 1719, when the lease was granted. The lessor of the plaintiff was to make out his case. He shows no possession in himself, or those under whom he claims, since the granting of the lease; and no act of ownership; therefore, there is nothing to rebut the presumption which arises upon the face of the lease.

Under these circumstances, I think that the learned Judges in Ireland came to a right conclusion. I should have been very reluctant upon such a question to have come to a contrary decision to that which they have unanimously pronounced, they being familiar with the language employed in these instruments; and, without hesitation, I concur in the judgment they gave, and think that judgment ought to be for the defendant in error.

Judgment affirmed with costs.

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DAVID CORBET, Printer, 11 Upper Ormond-quay.

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signatures a reservation in the following terms: "Without prejudice to any additional security we may hold." It further appeared that the arrangement with respect to the composition was entered into with the knowledge and concurrence of the defendant; and that the plaintiffs, at the time of signing the agreement, held no other security for the debt so due by D. than his said acceptances of the defendant's drafts.

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DEBTOR AND CREDITOR.

In an action against the defendant as drawer of a bill of exchange, it appeared that the bill in question, with others, had been drawn by defendant upon, and accepted by D. to secure a debt due by

D. to the plaintiffs. D. having become embarrassed in his circumstances, and a commission of bankruptcy having been issued against him, called a meeting of his creditors, who signed an agreement to accept a composition of seven shillings and sixpence in the pound, to be secured by the drafts of D. on the defendant. The plaintiffs and other creditors of D. who signed the composition agreement, annexed to their respective signatures a reservation in the following terms: "Without prejudice to any additional security we may hold." It further appeared that the arrangement with respect to the composition was entered into with the knowledge and concurrence of the defendant; and that the plaintiffs, at the time of signing the agreement, held no other security for the debt so due by D. than his said acceptances of the defendant's drafts. *Held*, that notwithstanding the reservation annexed to their signature, the plaintiffs, by signing the agreement for a composition, had discharged the defendant from his original liability as surety upon the bills so drawn by him and accepted by D. to secure the debt of the latter. *L. E. Grundy v. Meighan* 519

DECLARATION BY THE BYE.

See PLEADING, 7.

DEEDS AND CONVEYANCES.

See STAMPS.

1. By deed reciting that A. B. by his will had devised to C. D. the sum of £10,000 to be paid out of testator's C. estates, which he thereby charged with the payment thereof, and which estates he devised to the defendant. It was witnessed that C. D. had granted to the plaintiff an annuity of £200 to be payable out of the interest of said sum of £10,000; and the deed contained a covenant by the defendant, that he would pay the said annuity during the life of the grantor, and that it should remain a charge on said C. estate; and also a covenant for further assurance by C. D. and the defendant. *Held*, that the covenant to pay this annuity was not contingent upon the solvency of the

fund. Q. B. *Bruce v. Lord Ponsonby* 414

2. *Held also*, that the defendant was estopped from showing that the said C. estate was discharged from the payment of the annuity. *Ibid*

3. By a lease bearing date 1719, the lessor granted "All that part of the townland of B. containing five hundred and nine acres of arable, meadow and pasture, for three lives renewable for ever; bounded on the south by Derrygarree, on the north and east by Lough Neagh, and on the west by Tough's and Wallwood's lands, lying and being, &c., with all and singular the rights, members, privileges, advantages, easements and appurtenances thereto belonging, excepting and reserving all mines, minerals, and quarries of stone and coal, escheats, waifs, estrays, deodands, courts leet and courts baron, seneschalships, and all other royalties, privileges, muniments and franchises whatsoever; with liberty of hunting, fishing, &c., and excepting and reserving all timber and wood above or under ground, with liberty to dig for and carry away the same." It was proved that part of the said townland of B., called Tough's and Wallwood's lands, was in possession of a third party, and that a portion was held by the lessor of the plaintiff in his own possession. *Held*, affirming the judgment of the Queen's Bench and Court of Error in Ireland, that a large quantity of bog, which lay within the boundaries of the demise in the said lease, passed thereunder, in addition to the five hundred and nine acres of arable, meadow, and pasture land. Dom. Proc. *Jack v. M'Intyre* 552

DEMURRER.

See PLEADING.

DISTRESS.

See LANDLORD AND TENANT.

DUBLIN.

See BALLAST CORPORATION.

DUPLICITY.

See CRIMINAL LAW, 14.

EJECTMENT.

EASEMENT.

See TRESPASS.

ECCLESIASTICAL PROPERTY.

1. Where an order of the Lord Lieutenant and Privy Council, made under the Church Temporalities Acts, disappropriating the rectory of E. from the dignity of the treasurership of the Cathedral Church of St. M., contained a recital distinguishing the rents of the glebe lands from the other revenues of the rectory; and where the operative words of the Order in Council were—"the said parish or rectory of E., together with the rectorial tithes thereunto belonging;" *Held*, that according to the true construction of the Order, the word "rectory" did not include the glebe lands, and that therefore they did not pass to the Ecclesiastical Commissioners, but continued annexed to the treasurership. L. E. *Lessee of Forster v. Wilson* 197
Affirmed, in Error, *see ibid* 231
2. The Lord Lieutenant and Privy Council have the power, under the Church Temporalities Acts, to make a partial disappropriation, by disuniting the tithes or glebe lands from the rectory. *Ibid*
3. Where a beneficed clergyman had been discharged as an insolvent debtor, the Court held that a judgment creditor, whose debt had been returned in the schedule, might legally issue a *feri facias*, for the purpose of obtaining a return of *nulla bona*, and thereupon issue a *levari de bonis ecclesiasticis*. C. P. *Executors of Mills v. Horner* 212

EJECTMENT.

See ERROR, 2, 3.

SERVICE, 1.

1. The Court will allow a demise in an ejectment to be amended before defence taken, without prejudice to the rules to plead. Q. B. *Bell v. Ejector* 195
2. On the death of the lessor of the plaintiff after the issuing of the *habere*, but before its execution, the Court will grant a renewal of the *habere*. Q. B. *Lessee Lord Powerscourt v. Ejector* 196

3. In an ejectment for non-payment of rent, and judgment against the casual ejector, the affidavit filed pursuant to the 4 G. 1, c. 5, for the purpose of ascertaining the rent, stated that there was due to the lessor of the plaintiff, the sum of £31. 2s. 6d., being the balance of the six years' rent; *Held*, that the affidavit was defective, in omitting to state that more than one year's rent was due; and the Court accordingly set aside the *habere* and let the defendant in to take defence upon terms, notwithstanding a subsequent affidavit, stating that the sum of £31. 2s. 6d. was more than five years' rent of the premises. *L. E. Lessee Doyle v. Casual Ejector* 383

4. In an ejectment on the title, the plaintiff produced and proved a lease of the premises bearing date in 1769, purporting to have been made by one E. D. W. to J. A., "for and during the term of sixty-six years, provided the said E. D. W.'s lasted so long;" but gave no evidence of the existence of the interest of E. D. W. in the premises. There was some evidence of a verbal negotiation between the defendant and plaintiff for a new lease between 1835 and 1838, in which latter year the defendant got into possession. *Held*, that notwithstanding proof of the death of the said E. D. W. in 1821, the Jury were properly directed to find a verdict for the plaintiff; and that as the lease must be taken to have expired in 1834, there was no ground for the operation of the Statute of Limitations. *C. P. Lessee Wilson v. Hendren* 429

ERROR, COURT OF.

See CRIMINAL LAW.

1. The Court will not suspend judgment in a criminal case pending a writ of error. *Q. B. Regina v. O'Connell* 356
2. Where on a writ of error brought on a judgment in ejectment, which had been commenced in the county of D., the error assigned was, that before and at the time of the teste of the *venire*, and thence until and at the time of the trial, the lands in question were situated in the county of L. and not in the county

D., without stating that at the time of the ejectment brought, the premises were in the county of D.; *Held*, that this assignment of error was insufficient. *Lessee Heywood v. Reynolds* 409

3. *Quære*—Is such a defect cured by the Statute of Jeoffails? *Ibid*

EVIDENCE.

See EJECTMENT, 4.

I. Generally.

1. The Court is bound to take judicial notice that a particular day of the month falls on Sunday. *Q. B. Pearson v. Shaw* 1
2. When on a sale by auction of certain property of a bankrupt, the conditions of sale referred to public advertisements which professed to contain a description of the property to be sold—*Held*, in an action of assumpsit by the vendee against the assignee of the bankrupt to recover back the deposit on the purchase-money, that these advertisements were admissible evidence to show that the conditions of sale misdescribed the premises. (*Dissentiente PENNEFATHER, C. J.*) *Q. B. Thompson v. Guy* 6
3. Where an indictment charged a conspiracy to cause the Queen's subjects to meet in unlawful and seditious assemblies, and thereby to intimidate the Government, and one of the overt acts laid in the indictment was a meeting at M.; *Held*—that a ballad publicly handed about and sold at such meeting was evidence against the parties charged with the conspiracy as part of the *res gestæ*, and showing the character of the meeting, although the traversers may have been individually ignorant of its contents. *Q. B. Regina v. O'Connell* 261
4. The statutable proof of the publication of a newspaper is sufficient evidence not only against the proprietor, but also against any person affected by his acts. *Ibid*
5. The act of one conspirator done in pursuance of the common object, is evidence against his co-conspirators; therefore, proof of the publication of newspapers by

one of the conspirators in furtherance of the common object, is admissible evidence against the rest; *sed, per* PERRIN, J., they are not evidence to be left to the Jury to establish the fact of the conspiracy. Q. B. *Regina v. O'Connell* 261

6. Admissions, and letters written by an infant, are receivable in evidence on the part of the plaintiff, in an action brought against him (the infant) after attaining his full age, for necessities furnished to him during infancy. C. P. *O'Neill v. Read* 434

7. In an action of libel against the editor of a newspaper, the defendant pleaded the general issue and the special plea given by the 6 & 7 Vic., c. 96, s. 2. *Held*, that libels published in the same newspaper, and during the same editorship, more than six years before the publication of the libel complained of, were properly received in evidence on the part of the plaintiff; the Judge having directed the Jury not to take the said prior publications into consideration in estimating the damages, but only for the purpose of ascertaining the *animus* of the defendant. C. P. *Long v. Barrett* 439

II. Competency of Witness.

8. If a man is incompetent to be examined as a witness on the ground of interest, the evidence of his wife is likewise inadmissible. If a witness is incompetent to be examined on any point, on the score of interest, he is incompetent to be examined at all. Exch. Ch. *Coffey v. Burriess* 509

EXCEPTIONS, BILL OF.

1. A junior Counsel must always open a bill of exceptions. Q. B. *Hemphill v. McKenna* 395

2. A motion to extend the time for making up a bill of exceptions, must be upon notice. L. E. *Russell v. Whaley* 492

EXCISE.

See REVENUE.

An appeal does not lie under 7 & 8 G. 4, c. 53, s. 82, from a dismissal by Justices at Petty Sessions of an information brought for a customs offence (under

3 & 4 W. 4, c. 53, s. 44) by an excise officer, by virtue of 4 & 5 W. 4, c. 52, s. 28. Q. B. *Regina v. McFeely* 395

EXCLUSIVE POSSESSION.

See TRESPASS, 5.

EXECUTION.

See BANKRUPT.

SHERIFF.

EXECUTORS AND ADMINISTRATORS.

1. Executors, plaintiffs in *scire facias*, prior to the passing of 3 & 4 Vic. c. 105, cannot be held liable for costs when judgment is given against them. Q. B. *Farran v. Ottiwell* 54

2. When on the death of a lessee for lives, his heir-at-law took possession of premises demised to the lessee, and the rent thereof having become due after the death of the lessee, and during the possession of the heir-at-law, the executor of the lessee was compelled to pay it to the lessor; *Held*, that the heir-at-law was liable to the executor in an action for the money so paid by him. Q. B. *Kirkwood v. Burke* 387

3. *Held also*—That the executor was not bound to sue in his representative capacity. *Ibid*

4. Where a landlord entitled to a rent makes a distress, and dies without appointing an executor, neither a detainer of that distress, nor an original distress made by a party, can be justified in an avowry by that party subsequently taking out administration before the avowry. Q. B. *Rogers v. Dejoncourt* 482

GLEBE LANDS.

See ECCLESIASTICAL PROPERTY.

GROCER.

See REVENUE.

GUARDIANS.

See POOR LAWS.

HABERE.

See EJECTMENT, 2.

HOSPITAL.

HOSPITAL.

See APOTHECARY.

HUSBAND AND WIFE.

If a man is incompetent to be examined as a witness on the ground of interest, the evidence of his wife is likewise inadmissible. If a witness is incompetent to be examined on any point, on the score of interest, he is incompetent to be examined at all. Exch. Cham. *Coffey v. Burris* 509

INCOMPETENCY.

See EVIDENCE, II.

INDICTMENT.

See NUISANCE.

INFANT.

Admissions, and letters written by an infant, are receivable in evidence on the part of the plaintiff, in an action brought against him (the infant) after attaining his full age, for necessities furnished to him during infancy. C. P. *O'Neill v. Read* 434

INQUIRY.

See STAMP.

INSOLVENT.

See ECCLESIASTICAL PROPERTY.
JUDGMENT AS IN CASE OF
NONSUIT.

INTEREST.

See EVIDENCE, II.

INTEREST, PECUNIARY.

Quære—Whether the following clause of statute 2 & 3 Vic. c. 37, “Any contract for the loan or forbearance of money, above the sum of £10 sterling,” is to be construed as a general clause extending to any contract for the loan or forbearance of money above the sum of £10; or whether it is to be restricted to contracts for the loan or forbearance of money upon the faith or security of bills or notes? L. E. *Sawyer v. Maguire* 373

JURY.

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IRREGULARITY.

See MOTION.

SETTING ASIDE PROCEEDINGS.

JUDICIAL NOTICE.

See EVIDENCE, I.

JUDGMENT.

See CRIMINAL LAW.

LIMITATIONS, STATUTES OF.
SETTING ASIDE PROCEEDINGS.

JUDGMENT AS IN CASE OF NONSUIT.

Where a plaintiff, in showing cause against a conditional order to enter up judgment as in case of a nonsuit, avers his belief that the defendant is in insolvent circumstances, and states facts from which such insolvency might be inferred, the defendant must, in addition to a denial or explanation of such facts, aver directly that he is solvent. C. P. *O'Connor v. Evans* 210

JUDGMENT, ARREST OF.

See CRIMINAL LAW, 13, 14, 15,
16, 17, 18, 19.

JURISDICTION.

See CRIMINAL LAW.
SERVICE.

1. The Court have no jurisdiction to pronounce any rule on an application made by a party who had held, and had been dismissed from the office of crier of the Court by the Chief Justice, to be restored to the emoluments and duties of said office, alleging that he had been illegally and improperly dismissed therefrom. C. P. *In re Kennedy* 217
2. The Court does not possess a jurisdiction to entertain such an application in the case of any officer. (*Dissentiente* TORRENS, J.) *Ibid*

JURY.

1. Where on a motion for a new trial in a case of misdemeanour made on behalf of a traverser, it appeared that the name of one of the Jurors was J. J. R., but on the jurors' book and on the jury panel,

the name was J. R., and by that name the Juror answered and was sworn, without any objection being made by the traversers' Counsel; *Held*, that this was no ground of mistrial. Q. B. *Regina v. O'Connell* 261

2. On such trial, the Jury having been allowed to separate each day at the adjournment of the Court; *Held*, that this was no ground of mistrial. *Ibid*
3. Under the provisions of 3 & 4 W. 4, c. 91, it is the duty of the Recorder of Dublin annually to revise the lists of Jurors of the county of that city, and to cause a general list of Jurors to be made out, and delivered over to the Clerk of the Peace of the said city for the purposes of the ensuing year. On motion for a new trial, on the grounds that these general jury lists, from which were framed the jurors' book and the special jury list, were fraudulently dealt with, for the purpose of prejudicing the traversers in their defence; *Held*, that this was not proper ground for a motion for a new trial. *Ibid*
4. A Town Councillor of the borough of Dublin is exempt and disqualified from serving on any Special Jury summoned on trials in the Superior Courts. And the objection may be taken advantage of, either before the officer at the striking of the Special Jury, or by a challenge to the polls, when the Juror comes to be sworn. C. P. *Long v. Barrett* 439

LANDLORD AND TENANT.

Where a landlord entitled to a rent makes a distress, and dies without appointing an executor, neither a detainer of that distress, nor an original distress made by a party, can be justified in an avowry by that party subsequently taking out administration before the avowry. Q. B. *Rogers v. Dejoncourt* 482

LEASE.

See DEEDS AND CONVEYANCES.

LETTERS.

See EVIDENCE, 6.

LIMITATIONS, STATUTE OF.

LICENSE.

See REVENUE.

LIBEL.

1. In an action of libel against the editor of a newspaper, the defendant pleaded the general issue and the special plea given by the 6 & 7 Vic. c. 96, s. 2. *Held*, that libels published in the same newspaper, and during the same editorship, more than six years before the publication of the libel complained of, were properly received in evidence on the part of the plaintiff; the Judge having directed the Jury not to take the said prior publications into consideration in estimating the damages, but only for the purpose of ascertaining the *animus* of the defendant. C. P. *Long v. Barrett* 439
2. In an action for a libel, the defendant having pleaded the general issue, and the special plea of an apology under the 6 & 7 Vic., c. 96, s. 2, the Court refused to allow him to withdraw the latter plea, the plaintiff having sworn that he would be prejudiced thereby at the trial. C. P. *Sullivan v. Lenihan* 463

LIBERTY TO TOT.

In an action of covenant on an annuity deed by the executor of the grantee, who had obtained judgment on demurrer, the ordinary rule for liberty to tot is the proper one. (PENNEFATHER, C. J., *dissentiente*.) Q. B. *Bruce v. Lord Ponsonby* 422

LIMITATIONS, STATUTE OF.

See EJECTMENT, 4.

PLEADING, 8.

1. A plea of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40) is no answer to a *scire facias*, in which a judgment obtained more than twenty years before the issuing of the *scire facias*, and an award of execution on the same to the administrator of the conusee against the conusor, within the twenty years, are set out. C. P. *Conlan v. Bodkin* 467
2. A judgment was obtained in 1813, and revived by *scire facias* at the suit of the executor of the conusee against the heir

and tertenants of the conusor in 1829. A bill was filed in 1838 in the Court of Exchequer in Ireland, against the representatives of the real and personal estate of the debtor, praying for an account, and payment of the principal and interest due on the judgment, out of the debtor's personal or real estate. *Held*, that a plea of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40), by a defendant claiming part of the real estate under a settlement bearing date subsequent to the original judgment, but prior to the judgment of revivor, was no bar to the suit. Dom. Proc. *Farrell v. Gleeson* 478

LOAN.

See INTEREST.

LORD LIEUTENANT.

See ECCLESIASTICAL PROPERTY.

MALICIOUS ARREST.

1. Case.—The declaration stated that B. (the defendant), wrongfully, maliciously and without any probable cause, procured A. (the plaintiff) to be arrested and imprisoned under pretence of a decree for the sum of £10 debt and six shillings costs, theretofore obtained in the Court of the Assistant Barrister of the county K., by the procurement of defendant, in the name of one C., but without the authority, consent or knowledge of said C., and to be kept and detained in prison for the space of six months. At the trial, it appeared that B. had caused A. to be served in the name of C., as the plaintiff therein, with a civil bill for “£20 due for timber and slates sold and delivered by C. to A., which A. promised to pay; and other £20 due on foot of an account stated and settled by and between C. and A., which sum A. promised to pay.” A decree was obtained thereon, “in the sum of £10 for timber and slates sold and delivered by C. to A.,” under which decree, B. procured A. to be arrested. For the defendant B. it was contended that the civil bill was void, as it included two demands, which together exceeded the jurisdiction of the Civil Bill Court;

that the decree founded thereon was also void; and that the action should, therefore, have been trespass and not case. *Held*, that (without deciding whether trespass would or would not lie), an action on the case might also be sustained, irrespectively of the question as to the validity of the civil bill process, inasmuch as the decree obtained thereon was for a sum within the jurisdiction of the Civil Bill Court; and as it was not competent to B. to avoid his own acts by setting up the nullity of the civil bill proceedings. L. E. *Ryan v. Shee* 536

2. *Quære*.—Whether a civil bill can be maintained which includes several demands, separately within the jurisdiction of the Assistant Barrister's Court, but in the aggregate beyond it? *Ibid*
3. *Semble*.—That any objection arising from the excess of demand, apparent on the face of the civil bill, in such cases, may be obviated by varying the grounds of the demand, and including all in one sum, not exceeding the limit of the jurisdiction of the Assistant Barrister's Court. *Ibid*
4. Upon a motion in arrest of judgment, it having been objected that the above declaration was defective; first, because it contained no averment of a warrant having been granted by the Sheriff, under which the arrest took place; and secondly, because the decree was not alleged to have been obtained against the plaintiff in the present action; *Held*, overruling both objections; first, that the Sheriff was not bound to grant a warrant, and *non constat* but that he may have executed the decree in person; and secondly, that, after verdict, the Court was bound to intend that the decree proved at the trial was one obtained against the present plaintiff. *Ibid*
5. *Quære*.—Even if it appeared that the decree had been obtained against a third person, it might have been so used against the plaintiff, as to enable him to maintain the present action against the defendant? *Ibid*

MISDEMEANOUR.

See CRIMINAL LAW.

MISDIRECTION.

See NEW TRIAL, 2.

MISTRIAL.

See NEW TRIAL.

MOTION.

1. A notice of motion is irregular if it does not state the grounds on which it is made; and a reference to an affidavit filed is not sufficient. C. P. *Larkin v. Lawder* 227
2. A motion to extend the time for making up a bill of exceptions, must be upon notice. L. E. *Russell v. Whaley* 492

NECESSARIES.

See INFANT.

NEWSPAPER.

See EVIDENCE, 4, 5, 7.

NEWSPAPER.

See LIBEL.

NEW TRIAL.

1. This Court will entertain a motion for a new trial in a misdemeanour case after a trial at bar. Q. B. *Regina v. O'Connell* 261
2. The expression by a Judge of his opinion as to the facts of the case, without submitting them exclusively to the Jury, is no ground for setting aside a verdict for misdirection, such being a matter resting with the discretion of the Judge. *Ibid*

NOTICE OF MOTION.

See MOTION.

NOTICE OF TRIAL.

The 29th Rule of this Court, requiring a Term's notice before going to trial when the cause is three Terms at issue, is not now acted on. Q. B. *Condon v. Condon* 427

NUISANCE.

On the trial of an indictment at common law for a nuisance in a public navigable

river, by erecting weirs, a finding by the jury, that such weirs obstructed the navigation but to a very trifling degree, *Held*, to amount to a verdict of guilty. Q. B. *Regina v. Haynes* 2

OCCUPATION.

See TRESPASS, 5.

OFFENCES.

See CRIMINAL LAW.

ORDER.

See CONDITIONAL ORDER.

PARTICULARS, BILL OF.

See TRESPASS, 1.

PARTICULARS OF DISTRESS.

See REPLEVIN.

PETTY SESSIONS.

See APPEAL.

PLEADING.

I. Declaration.

See MALICIOUS ARREST.

1. A declaration stated that the defendant was indebted to J. C., deceased, in a certain sum for work and labour; and in another sum for goods sold and delivered by the said J. C.; and in another sum for agisting of divers cattle, without averring any promise to pay; it also contained the money counts, which thus commenced: "And also, the said defendant, on the same day and year, and at the place aforesaid, was indebted," &c., and thus concluded, "And therefore the defendant afterwards, to wit, on the day and year last aforesaid, and at the place aforesaid, in consideration of the premises, then and there promised to pay the said *last mentioned* several monies respectively, to the said J. C., in his lifetime, on request; yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof." *Held*, on special demurrer, that the first set of counts were bad as not containing a promise. Q. B. *Condon v. Condon* 399

II. *Subsequent Pleadings.*

2. Trespass against a Sheriff and others for breaking and entering plaintiff's house, and seizing and converting his goods; the defendants justified under a *fi. fa.*; to which the plaintiff replied that the defendants, "of their own wrong, seized and took the goods and chattels in the introductory part of that plea mentioned, to a greater extent and much more than was necessary for the purpose in that plea mentioned, in manner and form as the plaintiff had in and by his declaration complained against them the said defendants;" *Held*, on demurrer, that the replication was bad, a Sheriff not being liable in *trespass* for an excessive seizure. L. E. *Hughes v. Browne* 492
3. The plaintiff having fallen back upon the defendants' plea as defective, for omitting to aver that one of the defendants had done any act, or in any way participated in the seizure or sale of the goods, and that the plea was therefore bad as not amounting to a confession by all the defendants of the charges contained in the declaration; *Held*, that the plea was cured by pleading over, the plaintiff having, by his replication, admitted that all the defendants had joined in the seizure of the goods. *Ibid*
4. Trespass.—Plea, that after the committing of the trespass, and before the exhibiting of the bill, it was agreed between plaintiff and defendant, that the latter should do and perform certain work which was then agreed upon, and furnish materials for the same, for the plaintiff, in satisfaction and discharge of the trespass. Averment, that in pursuance of the agreement, the defendant did and performed the work, and found and provided materials for the same for the plaintiff, and that the plaintiff accepted and received such work and materials in full satisfaction and discharge of the trespass. Demurrer, upon the grounds that neither the nature of the agreement, nor particulars of the work performed had been stated with sufficient certainty. *Held*, that the plea was good; first, because the statement of the agreement was immaterial, and could

not have been traversed by the plaintiff; and secondly, that a statement of the particulars of the work would have been objectionable, as falling within the rule prohibiting the introduction into pleadings of matters of evidence. L. E. *Craig v. Byrne* 500

5. To a plea of the Statute of Limitations, plaintiff replied a writ sued out with continuances. After stating the defendant's appearance to the last writ, the replication contained a *prout patet* in the following form:—"As by the *record* and proceedings thereof remaining in the Court of, &c., may more fully and at large appear." Rejoinder, that there was "not any *record* remaining in said Court, in manner and form as plaintiff had in his replication alleged." *Held*, on special demurrer, that inasmuch as the several proceedings set forth in the replication, constituted but one record, the rejoinder was sufficient in law. L. E. *Brennan v. Monahan* 545
6. *Quære*.—If the replication was bad on general demurrer as not having been framed in compliance with 3 & 4 *Vic.* c. 105, s. 7? *Ibid*

III. *Practice as to Pleadings.*

7. A declaration by the bye must be filed in Term, and a copy of it served on the opposite party in the Term in which it is filed. Q. B. *Hunt v. Lane* 56
8. Amendment of a plea of the Statute of Limitations will be allowed after special demurrer, and before argument, without any affidavit of merits. C. P. *Meyler v. Morton* 229
9. In an action for a libel, the defendant having pleaded the general issue, and the special plea of an apology under the 6 & 7 *Vic.* c. 96, s. 2, the Court refused to allow him to withdraw the latter plea, the plaintiff having sworn that he would be prejudiced thereby at the trial. C. P. *Sullivan v. Lenihan* 463

PLEAS OF CONFESSION.

1. The practice of requiring pleas of confession to be given contemporaneously with securities by bills or notes,

16 PLEA OF CONFESSION.

is an improper practice, and one which is strongly discountenanced by the Court. L. E. *Sawyer v. Maguire*

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2. A plea of confession given by an attorney before action brought, is not invalid, and a judgment entered thereon will not be set aside. *Ibid*

3. *Quære*—If it would be otherwise in the case of an ordinary individual giving a plea of confession, previously to a writ sued out, or an action commenced against him? *Ibid*

POSTEA.

A motion to amend the *postea* ought to be made within the first four days of the Term succeeding the verdict. Q. B. *Regina v. O'Connell*

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POSSESSION.

See TRESPASS, 5.

PRISONERS.

See CRIMINAL LAW.

PRIVY COUNCIL.

See ECCLESIASTICAL PROPERTY.

PUBLIC COMPANY.

See APOTHECARIES' HALL, COMPANY OF.

PUBLICAN.

See REVENUE.

RECOGNIZANCE.

1. In a *scire facias* on a Crown-bond or recognizance; *Held*, on plea of *nul tiel record*, that it is unnecessary to set forth the condition of the bond or recognizance, it appearing from the uniform course of precedents in the office, to be the practice to omit the condition. R. E. *Attorney-General v. Upton*
2. *Semble*—that such practice is borne out by the authorities. *Ibid*

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RECORD.

See PLEADING, 5, 6.

RECORDER.

See JURY, 3.

REVENUE.

RECTORY.

See ECCLESIASTICAL PROPERTY.

RENT-CHARGE.

Covenant to pay a rent-charge does not run with the rent to the assignee of the rent-charge. Q. B. *Kennedy v. Stewart*

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REPLEVIN.

The extent of the jurisdiction given to the Assistant-Barrister by the 6 & 7 W. 4, c. 75, in replevin cases, is to be governed by the amount of the reserved annual rent; and not by the amount of the rent distrained for. Exch. Cham. *Daniel v. Bingham*

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REVENUE.

See EXCISE.

STAMPS.

1. A grocer obtaining the license specified in the 6 & 7 W. 4, c. 38, s. 3, to retail spirits in quantities not less, at one time, than one pint, and to be consumed elsewhere than in the house or on the premises of such retailer, is liable to the higher rate of duty imposed upon retail spirit licenses by the 2nd section and schedule of the 6 G. 4, c. 81., viz.: from £9. 9s. to £13. 13s. according to the value of the premises. (BRADY, C.B., *dissentiente.*) L. E. *Dickson v. Pape*
2. The effect of the 6 & 7 W. 4, c. 38, s. 3, is that a licensed publican is not entitled to a grocer's license for the sale of coffee, tea, &c., on the same premises; and a person holding a grocer's license is not entitled to any other license for the sale of spirits, but that mentioned in the 6 & 7 W. 4, c. 38, s. 3. Exch. Cham. *McKenna v. Pape*
3. The higher duty imposed on grocers taking out spirit licenses by the schedule to the 6 G. 4, c. 81, s. 2, is not the duty chargeable on the license specified in the 6 & 7 W. 4, c. 38, s. 3; and therefore when the collector of excise refused to grant such a license to a duly licensed grocer, without the payment of the said higher duty imposed by the 6 G. 4, which was accordingly paid under protest;

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Held, reversing the decision of the Court of Exchequer, that the grocer could maintain an action against the collector for the difference between the said rate of duty and the duty imposed on publicans' retail spirit licenses by the same Act of 6 G. 4, c. 81. (*Dissentientibus* LEFROY, B., RICHARDS, B., TORRENS, J., and PENNEFATHER, B.) Exch. Cham. *Dickson v. Pape* 107

SCIRE FACIAS.

See JUDGMENT.

1. In a *scire facias* on a Crown-bond or recognizance; *Held*, on plea of *nul tiel record*, that it is unnecessary to set forth the condition of the bond or recognizance, it appearing from the uniform course of precedents in the office, to be the practice to omit the condition. *The Attorney General v. Upton* 505
2. *Semble*, that such practice is borne out by the authorities. *Ibid*

SERVICE.

1. In an ejectment at common law for non-payment of rent, where a party could not be served with the summons, the Court deemed a service, by posting on the premises and by service of the summons and declaration on another person, who had the key of the premises, and who stated she was authorised to let or treat for them, good service on that party. *L. E. Doe v. Ejector* 498
2. The Court has authority, under 43 G. 4, c. 53, to order service of process to be substituted on a defendant resident out of the jurisdiction: and it is a question of discretion, depending on the particular circumstances of each case, whether the Court will make such order. *L. E. Phelan v. Johnson* 527

SETTING ASIDE PROCEEDINGS.

Where a judgment of revivor, and execution thereon, had been set aside, on allegations of non-service and of payment, on the terms of the plaintiff issuing another *scire facias*, and trying an issue on a plea of payment at the next Assizes, the defendant undertaking not to bring any action whatever; the plaintiff having

omitted to issue said *scire facias*, the Court confirmed the setting aside of the *scire facias* and the execution, and struck out the undertaking on the part of the defendant not to bring an action. *C. P. Tuthill v. Unthank* 205

SHERIFF.

See BALLAST CORPORATION.

A Sheriff seizing and selling under a *fi. fa.*, more than sufficient to satisfy the amount of the execution, does not thereby render himself liable to an action of *trespass*. *L. E. Hughes v. Browne* 492

SPIRIT LICENSE.

See REVENUE.

STAMPS.

1. A. being in arrear with his landlord B., who had distrained his goods for such arrears; by a deed executed between them, it was witnessed, that in consideration of B. releasing and discharging A. from the payment of such arrears, and in consideration of five shillings, A. assigned and surrendered to B. the said premises for the remainder of the term unexpired; and also the goods and chattels so distrained, to hold the same as his own proper goods and chattels for ever; *Held*, in an ejectment on the title, that such deed only required a surrender stamp, and that an *ad valorem* duty on the sale of the goods was not necessary to render it admissible evidence in that particular action. *Q. B. Lessee White v. White* 50
2. A ten shilling stamp on a bond for £140. 9s. 8d., conditioned for the payment of one half year's rent of certain premises before the other became due (the half year's rent being £70. 4s. 10d.), is insufficient; and the said bond, with the condition, having been produced by the plaintiff on a writ of inquiry to assess damages, the verdict for the plaintiff was set aside with costs, and a new inquiry directed. *C. P. Kearney v. Power* 465

STATUTES.

1. The Lord Lieutenant and Privy Council have authority, under the Church

Temporalities Acts, to make a partial disappropriation of a rectory or vicarage, by disuniting the tithe or the glebe lands from it. (*Dissentiente* CRAMPTON, J.) Exch. Cham. *Wilson*, in error, v. Lessee of *Forster*, 231; affirming the judgment of the Court of Exchequer, for which see 197

2. "I admit the principle, that a duty is not to be imposed upon the subject by ambiguous words in an Act of Parliament; but where a duty is imposed by clear and plain language upon the public generally, and where a different duty is imposed by as plain and clear words upon a particular class excepted out of the general public and not deemed entitled to as favourable terms as the general public,—I am of opinion, that I ought not, unless upon reasonably plain and clear grounds, to hold that it was the intention of the Legislature at a subsequent period to free such class from all duty, that is, from a liability to pay any duty whatsoever (for that is the question), leaving the duty still on the public generally as originally imposed." *Per* Richards, B., in *Dickson v. Pape* 90

3. "I quite agree, that if the matter be so doubtful that the intention of the Legislature cannot be fairly made out, or if the words be so ambiguous that a sound construction cannot be arrived at, the subject should have the benefit of such doubt, and that a duty ought not to be levied which does not clearly appear to have been intended by the words of the Act of Parliament. That principle has been laid down by most eminent Judges; and it is a principle from which I would be very sorry to depart. It is, however, the duty of the Court carefully to examine the enactments, in order to ascertain if there be such doubt, or whether a plain intention is not to be inferred." *Per* Pennefather, B., in *Dickson v. Pape* 91

4. "I find that special license prohibited and repealed and a new license substituted in its place. Therefore, without drawing inferences, which I cannot do, I do not think that it was the intention of the Legislature to impose upon this

license the higher rate of duty; if it was their intention, they ought to have expressed it: they have not done so, and it is not within the province of the Court, or consistent with the decided authorities, to rely upon inferences in order to impose a burthen upon the subject. Let those whose duty it is to see that the excise laws are properly administered, go to the Legislature, and get them to express their intention in plain language so as to remove all doubt and ambiguity." *Per* Brady, C. B., in *Dickson v. Pape* 97

PARTICULAR STATUTES CITED OR COMMENTED UPON.

Edward I.

- 6, Executors, Costs 55

Henry VIII.

- 23, c. 15, *Eng.* Executor, Costs 55

Charles I.

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10, Sess. 2, c. 25, *Ir.* Replevin 30

William III.

- 8, 9, c. 3, *Eng.* Executors, Costs 55
9, c. 10, *Ir.* Executors, Costs 55

Anna.

- 6, c. 20, *Ir.* Dublin Ballast Office 63

George I.

- 2, c. 11, *Ir.* Civil Bills 30
4, c. 5, *Ir.* Ejectment for non-payment of rent 383
4, c. 13, *Ir.* Costs, Demurrer 55
6, c. 15, *Ir.* Dublin Ballast Board 63
10, c. 3, *Ir.* Dublin Ballast Board 63
12, c. 29, *Eng.* Service of Process 531

George II.

- 3, c. 9, *Ir.* Replevin 30
5, c. 27, *Eng.* Service of Process 531
15, c. 8, *Ir.* Distress 487
23, c. 8, *Ir.* Dublin Ballast Board 64
25, c. 13, *Ir.* Distress 487
33, c. 16, *Ir.* Dublin Corporation 64

STATUTES.

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55, c. 184, <i>Eng.</i>	Stamps	51
55, c. 194, <i>Eng.</i>	Apothecaries	392
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7, 8, c. 69, <i>Ir.</i>	Distress—Magistrates	31

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1, c. 21, <i>Ir.</i>	Mandamus—Costs	408
1, c. 31, <i>Ir.</i>	Trials at Bar	285
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3, 4, c. 101, <i>Ir.</i>	Church Temporalities	197, 231
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5, 6, c. 82.	Stamps	51
6, 7, c. 96.	Libel—Apology	439, 463
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SUGGESTIONS ON THE ROLL.

The Court will not allow the execution to issue, without suggestion of breaches, on a bond conditioned to pay over to the treasurer of a county the county cess to be levied by the high constable off a barony, before the next assizes. Q. B. *Montgomery v. Blackwood* 428

SURETY.

See BILL OF EXCHANGE. *

SUNDAY.

See EVIDENCE, 1.

TAKING OFF THE FILE.

This Court will not entertain a motion to take a demurrer off the file as frivolous. L. E. *Anonymous* 352

TERM'S NOTICE.

The 29th Rule of this Court, requiring a Term's notice before going to trial when the cause is three Terms at issue, is not now acted on. Q. B. *Condon v. Condon* 427

TITHES.

See ECCLESIASTICAL PROPERTY.

TOWN COUNCILLOR.

See CORPORATION.

TRESPASS.

1. A plaintiff in trespass is ordered to furnish a bill of particulars of the time when, and the place where, the particular acts of trespass complained of were committed, specifying the boundaries by a map. C. P. *Larkin v. Lauder* 227
2. A Sheriff seizing and selling under a *fi. fa.*, more than sufficient to satisfy the amount of the execution, does not thereby render himself liable to an action of trespass. L. E. *Hughes v. Browne* 492
3. Trespass against a Sheriff and others for breaking and entering plaintiff's house, and seizing and converting his goods; the defendants justified under a *fi. fa.*; to which the plaintiff replied that the defendants, "of their own wrong, seized and took the goods and chattels in the introductory part of that plea mentioned, to a greater extent and much more than was necessary for the purpose in that plea mentioned, in manner and form as the plaintiff had in and by his declaration complained against them the said defendants;" *Held*, on demurrer, that the replication was bad, a Sheriff not being liable in trespass for an excessive seizure. *Ibid*
4. The plaintiff having fallen back upon the defendants' plea as defective, for omitting to aver that one of the defendants had done any act, or in any way participated in the seizure or sale of the goods, and that the plea was therefore bad as not amounting to a confession by all the defendants of the charges contained in the declaration; *Held*, that the plea was cured by pleading over, the plaintiff having, by his replication, admitted that all the defendants had joined in the seizure of the goods. *Ibid*
5. To a declaration in trespass *q. c. f.*, for breaking, &c., the plaintiff's close, and

erecting pens and tables there, the defendant pleaded the general issue. At the trial the plaintiff proved a demise for a term of years of the *locus in quo* in these terms:—"All that and those that part of the house known as 119 North King-street, corner of Smithfield, consisting of the small room of the bar of said house fronting Smithfield, &c., together with the front part of said premises extending from said office to the centre of Smithfield market, &c., and to be used by said R. B. (the plaintiff) as a stand for the sale of cattle and hay, according to the usage of Smithfield market;" and also gave evidence of a custom for the owners of houses in Smithfield to let their frontage to salesmasters at a rent; and of the commission of the trespass complained of. On the other hand, the defendant gave evidence of no such usage being in existence in Smithfield, which was a public market; and some evidence of the lessor of the plaintiff having no title to demise the frontage: and the Judge directed the Jury, that if they believed that on a market day, the plaintiff had taken possession of the *locus in quo*, and was in the actual possession of the said frontage demised to him; and while so in possession, the defendant entered thereon against the will of the plaintiff, they should find for the plaintiff. *Held*, that the said direction was incorrect; and that the Judge ought to have explained to the Jury the distinction between a right to exclusive possession, which would have enabled the plaintiff to maintain this action, and such a right of occupation as was necessary for the enjoyment of an easement, which was not sufficient to maintain an action of trespass; and to have directed the Jury, that if they believed that the plaintiff had a right to the exclusive possession, they were to find a verdict for him; but if they believed that he had only a right to an easement, they ought to find for the defendant, the action not being maintainable. Exch. Cham. *Coffey v. Burris* 509

TRIAL.

See NOTICE OF TRIAL.

TRIAL AT BAR.

See CRIMINAL LAW.

Where after issue joined on an indictment for a misdemeanour, a *venire* was awarded returnable in Hilary Term, and on the issue so joined a trial at bar was fixed for a certain day in that Term; and it was ordered that in case the trial so fixed should not terminate on or before the last day of that Term, then that every succeeding day (if necessary) until the following Term should be appointed for the continuation of the trial; and that the days so fixed should, for the purpose of such trial, be taken to be part of such Term; *Held*, that this order was within the scope of the statute 1 & 2 W. 4, c. 31, and that the trial was properly continued in Vacation. Q. B. *Regina v. O'Connell* 261

VENDORS AND PURCHASERS.

See EVIDENCE.

STAMPS.

VENUE.

1. Slight evidence of venue is sufficient in a case of misdemeanour. Q. B. *Regina v. O'Connell* 261
2. The Court will not allow a plaintiff to change the venue, without some special grounds being stated. C. P. *Aungier v. English* 226
See in Q. B., *King v. Sharpy*, *ibid*, note
3. Where the venue has been changed upon the usual affidavit, and the plaintiff can give the undertaking required by the 47th General Rule—viz., to produce material evidence in the county where the venue was originally laid, the venue will not be brought back except upon the terms of his giving such undertaking; it not being sufficient in that case merely to falsify the defendant's affidavit. L. E. *Lewis v. Nixon* 359
4. But where the plaintiff can so far falsify the defendant's affidavit as to show that the cause of action has partly arisen out of the realm, the plaintiff is entitled to retain the venue in the county where it is laid, without an undertaking to give material evidence there, because in such case, it would be impossible to comply

with the undertaking required by the 47th Rule. *Ibid*

5. Where, however, the cause of action arises in different counties in Ireland, and the plaintiff has laid the venue in a county where no part of the cause of action has arisen, he cannot bring back the venue, by showing that the defendant's affidavit is false. *Ibid*
6. Where the venue had been changed upon the usual affidavit, and a motion was made to bring it back, upon the ground that the cause of action partly arose in England, but that fact did not appear with sufficient distinctness upon the plaintiff's affidavit; the Court refused to make the order, except on the terms of plaintiff's undertaking to give material evidence in the county where the venue was originally laid, or out of the jurisdiction. *Ibid*
7. Where on a writ of error brought on a judgment in ejectment, which had been commenced in the county of D., the error assigned was, that before and at the time of the teste of the *venire*, and thence until and at the time of the trial, the lands in question were situated in the county of L. and not in the county of D., without stating that at the time of the ejectment brought the premises were in the county of D.; *Held*, that this assignment of error was insufficient. Q. B. *Lessee Heywood v. Reynolds* 409
9. *Quære*—Is such a defect cured by the Statute of Jeoffails? *Ibid*
10. Venue changed upon terms, from the county of L. to the city of Dublin, in an action of covenant, before issue joined, upon an affidavit of the defendant, that it would be necessary for him to examine on the trial several witnesses, all of whom resided in Dublin, and some of whom were medical men in practice there; defendant undertaking to pay plaintiff's extra costs of bringing from L. to Dublin a person who was sworn to be a material witness for the plaintiff, if on the trial he should appear to be so; also undertaking to rejoin gratis, and take short notice of trial. L. E. *Shegog v. Murphy* 550

VERDICT.

1. On the trial of an indictment at common law for a nuisance in a public navigable river, by erecting weirs, a finding by the Jury, that such weirs obstructed the navigation, but to a very trifling degree; *Held*, to amount to a verdict of guilty. Q. B. *Regina v. Haynes* 2
2. It is no defence to such indictment, that although the weirs be in some degree a hindrance to the navigation of smaller vessels, yet that they were advantageous to larger vessels, by pointing out the channel. *Ibid*

WEIRS.

See VERDICT.

Ed. P. J. O.

